TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1921

No. [redacted]303

HARRIET L. LEVY, PAULINE JACOBS, AND ADELINE SALINGER, PLAINTIFFS IN ERROR,

vs.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, AND JOHN L. FLYNN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED APRIL 10, 1922.

(28,340)

(28,240)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 883.

HARRIET L. LEVY, PAULINE JACOBS, AND ADELINE SALINGER, PLAINTIFFS IN ERROR,

vs.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, AND JOHN L. FLYNN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 19, 1921.

a *Names and Addresses of Attorneys.*

Garret W. McEnerney, Esq.,
Hobart Building, San Francisco, California;

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Bank of Italy Building, San Francisco, California,
Attorneys for Plaintiffs in Error.

Frank M. Silva, Esq.,
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E. M. Leonard, Esq.,
Assistant United States Attorney,
Postoffice Building, San Francisco, California,
Attorneys for Defendants in Error.

1 In the Southern Division of the District Court of the United States for the Northern Division of California, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS, and ADELINE SALINGER
Plaintiffs,

vs.

JUSTUS WARDELL, United States Collector of Internal Revenue of the First District of California, Defendant.

Amended Complaint.

Come now the Plaintiffs above named, and by leave of the Court first had and obtained, file this, their amended complaint, complaining of defendant above named, and for cause of action allege:

I.

That defendant above named was at the time of the payment of the taxes hereinafter mentioned, and for some time prior thereto, and ever since has been, and now is, the duly appointed, acting, and qualified United States Collector of Internal Revenue of the First District of California, having his (the said defendant's) official place of residence in the City and County of San Francisco, State and Northern District of California.

II.

That the Levy Estate Company is, and at all times herein mentioned was, a corporation organized and existing under and by

virtue of the laws of the State of California, and engaged in business in the State of California.

III.

That on the 19th day of December 1902, and for some time prior thereto, Henriette Levy was the owner of 22,014 shares of the capital stock of the Levy Estate Company, a corporation.

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IV.

That on the said 19th day of December, 1902, the said Henriette Levy conveyed, transferred, set over, and assigned to Harriet L. Levy, one of the plaintiffs herein, 5,000 shares of the said stock.

V.

That on the said 19th day of December, 1902, the said Henriette Levy conveyed, transferred, set over, and assigned to Pauline Jacobs, one of the plaintiffs herein, 5,000 shares of said stock.

VI.

That on the said 19th day of December, 1902, the said Henriette Levy conveyed, transferred, set over and assigned, to Adeline Salinger, one of the plaintiffs herein, 5,000 shares of the said stock.

VII.

That on the 14th day of January, 1903, the said Henriette Levy conveyed, transferred, set over, and assigned to Harriet L. Levy, one of the plaintiffs herein, 2,660 shares of the said stock.

VIII.

That on the 14th day of January, 1903, the said Henriette Levy conveyed, transferred, set over, and assigned to Pauline Jacobs, one of the plaintiffs herein, 2,660 shares of the said stock.

IX.

That on the said 14th day of January, 1903, the said Henriette Levy conveyed, transferred, set over, and assigned to Adeline Salinger, one of the plaintiffs herein, 2,000 shares of the said capital stock.

X.

3 That on or about the 17th day of January, 1907, the following agreement was entered into by and between the said Henriette Levy and plaintiff Harriet L. Levy, and plaintiff Pauline Jacobs, and plaintiff Adeline Salinger, and Ruth Salinger:

"We, the undersigned, comprising all of the stockholders of the Levy Estate Company do hereby agree on account of certain errors made in the issuance of the stock of said corporation having been made as appears on the books of the company that all of the stock issued be cancelled, and certificates be issued to us in the following proportions in lieu thereof, we hereby agreeing to accept the number of shares of stock hereinafter set forth opposite our respective names as the correct number of shares to which we are respectively entitled, to-wit:

Henriette Levy	10 shares.
Harriet L. Levy	7,328
Pauline Jacobs	7,338
Adeline Salinger	7,337
Ruth Salinger	1
Total	22,014

XI.

That on the 17th day of January, 1907, the following resolution was passed at a meeting duly held of the Board of Directors of the Levy Estate Company.

"Resolved: That whereas certain errors have been made in the issuance of the capital stock of the company as appears on the books thereof and all of the stockholders and directors are desirous of having said errors corrected and said stock issued according to the payments made therefor and to the respective parties according to their respective rights and interests, and whereas all of the stockholders have agreed in writing that for the purpose of making such correction and issuing said stock according to the respective interest of the stockholders all of the outstanding certificates be cancelled and that in lieu thereof there be issued to the said stockholders twenty two thousand and fourteen (22,014) shares of the capital stock of the company (that being the number of shares paid for and authorized to be issued) to the following stockholders in the following proportions as agreed upon, to-wit:

Henriette Levy	10 shares.
Harriet L. Levy	7,328
Pauline Jacobs	7,338
Adeline Salinger	7,337
Ruth Salinger	1
	22,014

And whereas said agreement has been delivered to the company, that all of said outstanding certificates be cancelled and that there be issued in lieu thereof 22,014 shares of the capital stock of the company to the stockholders in said proportions, to wit:

Henriette Levy	10	shares.
Harriet L. Levy	7,328	"
Pauline Jacobs	7,338	"
Adeline Salinger	7,337	"
Ruth Salinger	1	"
	22,014	"

XIII.

That on the 17th day of January, 1907, the said Henriette Levy conveyed, transferred, set over, and assigned to Harriet L. Levy one of the plaintiffs herein, said ten (10) shares of the said stock.

XIV.

That after the passage of the said resolution, the secretary of the said corporation cancelled the certificates of stock then at that time outstanding in the names of plaintiffs herein, and issued to plaintiffs herein certificates of stock of the said corporation for the number of shares ordered in said agreement, and of said resolution of the said Board of Directors.

XV.

That after the conveyances, transfers and assignments hereinabove set forth as having been made from Henriette Levy to Harriet L. Levy, Pauline Jacobs and Adeline Salinger, the said Harriet L. Levy, Pauline Jacobs and Adeline Salinger became the owners of said stock and thereafter exercised the full rights of stockholders in said corporation, appearing at meetings and each voting the stock transferred, conveyed and assigned to them.

XVI.

That the said conveyances and transfers of the said stock to plaintiffs herein were complete transfers to the said plaintiffs of all of the right, title and interest of the said Henriette Levy, and of all ownership of the said Henriette Levy, in and to the stock of the said corporation, and that there were no stipulations or conditions mentioned or agreed to by or between the said Henriette Levy, and any of said transferees, under or by which the said Henriette Levy would ever be entitled to a return of said stock, or any portion thereof. That the said Henriette Levy retained no legal interest whatsoever in or to or with respect to said stock, or any portion thereof. That the plaintiffs herein promised and agreed with the said Henriette Levy that they, the said plaintiffs, would pay to said Henriette Levy the dividends on said stock accruing during the life time of the said Henriette Levy. That the said Henriette Levy retained no testamentary disposition or any legal right whatsoever over said stock or any of it, or any right of revocation.

XVII.

6 That the said Henriette Levy was at the time of the said transfers in good health, and was not at the said time in any expectation whatsoever of death. That the sole and exclusive object and purpose of the said Henriette Levy in making said transfers was to avoid the burden of business care and worry and management and control of her properties, and to vest in plaintiffs herein definite and irrevocable present rights of ownership in her said stock. That the said transfers by the said Henriette Levy were not in contemplation of, or intended to take effect in possession or enjoyment at or after the death of the said Henriette Levy.

XVIII.

That the said Henriette Levy died on the 15th day of December, 1916. That the said Henriette Levy was at the time of her death and at the time that all of the transfers herein referred to were made and at all times thereafter until her death, a resident of the County of Alameda, State of California. That the plaintiffs herein are the only surviving children of the said Henriette Levy, and are and were at all of the times herein mentioned residents of the State of California.

XIX.

That the said Henriette Levy at the time of her death left no property, or estate, or assets whatever. That consequently there was no administration whatever of any estate of the said Henriette Levy; that no part of said shares transferred as above indicated ever came into the estate of Henriette Levy and that there is no estate upon which any tax may be levied.

XX.

7 That notwithstanding the fact that all of the said shares of stock were so transferred and delivered by the said Henriette Levy to plaintiffs herein on the dates hereinabove respectively set forth and long prior to the enactment and approval of the so called estate tax created by act of Congress entitled an "Act to Increase Revenue and for Other Purposes", approved September 8th, 1916, and notwithstanding the fact that the said Henriette Levy, at the time of her death, left no property, estate, or assets whatever, the Commissioner of Internal Revenue of the United States, assuming to act in compliance with the provisions of the said act of Congress, attempted to levy and assess a tax in the sum of $12,460.84.

XXI.

That in the month of December, 1917, the said defendant in writing and orally demanded the payment of said pretended tax

and stated to plaintiffs at all of said times that unless the said tax was paid by plaintiffs herein, he, the said defendant, would immediately initiate proceedings for the collection of the said taxes, and would enforce the collection thereof by a seizure and sale of said shares of stock.

XXII.

That the said defendant did by force and duress by reason of said threats of proceedings to collect said tax, exact and demand from plaintiffs the said sum, and plaintiffs, by reason of said force and duress and threats, and involuntarily and unwillingly and under protest, and claiming at said time of said payments that no tax whatsoever was due, did pay to the defendant on the 26th day of December, 1917, the said sum hereinabove specified in gold coin of the United States, to wit, the sum of $12,460.84.

XXIII.

That the 5,000 shares of said stock transferred as above set forth to Harriet L. Levy on the 19th day of December, 1902, was of the value of $50,000.00.

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XXIV.

That the 5,000 shares of said stock transferred as above set forth to Pauline Jacobs on the 19th day of December, 1902 was of the value of $50,000.00.

XXV.

That the 5,000 shares of said stock transferred as above set forth to Adeline Salinger on the 19th day of December, 1902 was of the value of $50,000.00.

XXVI.

That the 2660 shares of said stock transferred as above set forth to Harriet L. Levy on the 14th day of January, 1903 was of the value of $26,660.00.

XXVII.

That the 2660 shares of said stock transferred as above set forth to Pauline Jacobs on the 14th day of January, 1903, was of the value of $26,660.00.

XXVIII.

That the 2,000 shares of said stock transferred as above set forth to Adeline Salinger on the 14th day of January, 1903 was of the value of $20,000.00.

XXVII.

That the 10 shares of said stock transferred on the 17th day of January, 1907, to Harriet L. Levy was of the value of $137.30.

XXX.

That after the passage of said resolution on the 17th day of January, 1907 *and* above set forth and at the time thereof and at the time of the issuance of the certificates in conformance thereto for 22,014 shares of stock, said shares were of the value of $302,252.22.

XXXI.

That the value of all of said 22,014 shares of stock on the 15th day of December, 1916, was the sum of $447,625.00.

XXXII.

That pursuant to and in accordance with Sections 3220, 3226 and 3228 of the Revised Statutes of the United States, and the Regulations prescribed by the Secretary of the Treasury of the United States, or on about the 6th day of December, 1918, plaintiffs duly made and filed a claim for refund to and with the Commissioner of Internal Revenue for a refund of the said taxes illegally and erroneously assessed, levied and collected as hereinabove set forth, which claim for refund was duly verified and contained on Form 46 as prescribed by the Regulations of the Secretary of the Treasury, and was made on all the grounds herein set forth.

XXXIII.

That thereafter, to wit, on the 25th day of June, 1919, Daniel C. Roper, the duly appointed, acting, and qualified Commissioner of Internal Revenue of the United States rendered a decision rejecting the said claim for refund.

XXXIV.

That no part of said sum of $12,460.84 has been repaid to plaintiff, and that the said sum is now wholly due, owing, and unpaid from defendant to plaintiffs herein.

XXXV.

That the transfers so made by said Henriette Levy all as hereinabove set forth were made long prior to the passage of the Act of Congress on September 8th, 1916 and the rights of the plaintiffs herein in and to said shares of stock did at the times that each of said transfers were made to them as hereinabove set forth then and

there become vested property rights as to the stock so transferred.

10 At the time of said transfers and each of them there was no law of the State of California imposing any transfer, inheritance or other tax upon a transfer to lineal descendants of the grantor whether or not the same was made in contemplation of death or to take effect in possession or enjoyment by the beneficiaries at or after the death of the grantor, and it has been judicially determined and decided by the highest courts of the State of California that such a tranfer, even if in contemplation of death or intended to take effect in possession or enjoyment at or after death, created vested property rights in the beneficiaries and that no law passed thereafter could impose any transfer or inheritance tax upon such transfer nor was there at that time any law of the United States imposing any transfer, inheritance or other tax upon such a tranfer.

But, as a matter of fact, when the said transfers were made and all of them, the said Henriette Levy was in good health and not in contemplation of death nor were they or any of them made for the purpose of avoiding any transfer or inheritance tax. That said grantor intended that the said transfers and all of them should take effect at once and in accordance with the legal affect of said transfers and the beneficiaries immediately entered into possession and exercised the rights of ownership and none of said transfers were intended to take effect in possession or enjoyment only at or after the death of Henriette Levy, but all of them were intended to and did take effect in possession and enjoyment upon the date of the transfer. That as plaintiffs are informed and believe and therefore allege, the said Act of Congress should not be construed to be retroactive or to apply to a transfer made or created prior to the passage of said Act and if it be construed as applying to such a transfer, the same is then in violation of the Constitution of the United States in that it would take property of the plaintiffs without due process of law in violation of the fifth amendment to the

11 Constitution of the United States and that it would take private property, to wit, the property of the plaintiffs for public use without just compensation, in violation of the fifth amendment to the Constitution of the United States and that it would not be a transfer tax or an indirect tax but would be a direct tax upon the property and rights of property of the plaintiffs and as a direct tax thereon would be in violation of Article I, Section 9, Sub-division Four of the Constitution of the United States because not laid in proper relation to census or enumeration as therein provided.

That for the reasons aforesaid the said amendment was made erroneously and illegally and the amount so exacted and retained by the defendant was exacted erroneously and illegally and without authority of law and that thereby the said plaintiffs were and are deprived of their property without due process of law in violation of the Constitution of the United States.

But plaintiffs further allege that there is no constitutional authority for the tax so exacted as applied to the transfers above set forth

and alleged and plaintiffs hereby invoke the protection of the Constitution of the United States against taxation not authorized thereby and against taxation forbidden thereby and also invoke the protection of the provisions of the Constitution of the United States above referred to, all of which are violated by making said tax applicable to said transfers or to any transfer made before the passage of said Act.

XXXVI.

That the original complaint was filed herein by plaintiffs against defendant on the 22nd day of December, 1919, and the summons therein was served on the defendant on the 22nd day of December, 1919, and the defendant appeared herein on the 19 day of February, 1920.

12 Wherefore plaintiffs pray judgment against said defendant for the sum of $12,460.84, together with interest thereon as provided by law from the 26th day of December, 1917.

(Sgd.) STETSON & THOMSON,
(Sgd.) BACIGALUPI & ELKUS,
Attorneys for Plaintiffs.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Pauline Jacobs being duly sworn, deposes and says she is one of the Plaintiffs in the above entitled action; that she has read the foregoing amended complaint and knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that she believes it to be true.

PAULINE JACOBS.

Subscribed and sworn to before me, this 11th day of May 1920.
[SEAL.] A. J. NAGLE,
Notary Public in and for the City and County San Francisco, State of California.

Service of the within amended answer admitted by copy this eleventh day of May, 1920.

ANNETTE ABBOTT ADAMS,
Attorney for Defendant.

Endorsed: Filed May 11, 1920. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

13 (Title of Court and Cause.)

Demurrer to Amended Complaint.

Comes now defendant in the above entitled action and demurs to the Amended Complaint on file herein on the following ground:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against said defendant.

Wherefore defendant prays that said amended complaint be dismissed and that he have his costs in this behalf expended.

ANNETTE ABBOTT ADAMS,
United States Attorney;
C. W. THOMAS, JR.,
Asst. United States Attorney,
Attorneys for Defendant.

Due service of the within Demurrer to Amended Complaint is hereby admitted this 20th day of May 1920.

STETSON & THOMAS,
BACIGALUPI & ELKUS,
Attorneys for Plaintiffs.

Endorsed: Filed May 20, 1920. Walter B. Maling, Clerk.

14 At a stated term, to-wit, the November term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Court room, in the City and County of San Francisco, on Thursday, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable William H. Hunt, Judge.

No. 16318.

HARRIET L. LEVY et al.

vs.

JUSTUS S. WARDELL, Collector, etc.

(*Order Sustaining Demurrer, etc.*)

Upon motion of E. M. Leonard, Esq., Assistant United States Attorney, attorney for defendant, it is ordered that defendant's demurrer to the amended complaint be submitted and that, on the authority of the decision in the case of Union Trust Co., et al. vs. Justus S. Wardell, Collector, etc. No. 16220, the said demurrer be and the same is hereby sustained; and Chas. De Y. Elkus, Esq., one of the attorneys for the plaintiffs, being present in open Court and stating that plaintiffs waive notice of sustaining the demurrer and that plaintiffs do not desire to further amend their complaint, it is ordered that this cause be and the same is hereby dismissed and that judgment be entered accordingly.

15 (Title of Court and Cause.)

Judgment of Dismissal.

In this cause the Court having sustained the demurrer to the amended complaint and the plaintiffs having stated that they do not desire to further amend, and the Court having, upon motion of E. M. Leonard, Assistant United States Attorney, ordered that this cause be dismissed and that judgment be entered herein accordingly:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiffs take nothing by this action and that defendant go hereof without day.

Judgment entered January 20, 1921.

WALTER B. MALING,
Clerk.

16 (Title of Court and Cause.)

Order Adding Party Defendant.

In the above entitled action it appearing to the court that the above entitled action having been brought against Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and the said Justus S. Wardell having thereafter resigned as such collector and John L. Flynn having been duly appointed United States Collector of Internal Revenue for the First District of California to succeed the said Justus S. Wardell, and he having duly qualified, and it being uncertain as to whether this is a proper case for the substitution of the said successor to the said defendant, Justus S. Wardell, or whether the said action should proceed against the said defendant, Justus S. Wardell, and it appearing to the court on motion of the plaintiffs that it is necessary for the survivor thereof to obtain a settlement of the questions involved:

Now, therefore, it is by the court ordered that so far as the said action is against the said defendant, Justus S. Wardell, in his official capacity, the same may be maintained against his successor in office, to-wit: John L. Flynn, United States Collector of Internal Revenue for the First District of California, and that so far as the same is against said defendant, Justus S. Wardell, personally, the same may be continued against him, and that the said action may be hereafter maintained and prosecuted against the said Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and said John L. Flynn, United States Collector of Internal Revenue for the First District of California, without further pleadings or process.

Dated: February 14th, 1921.

FRANK H. RUDKIN,
District Judge.

17 Endorsed: Filed Feby. 14, 1921. Walter B. Maling, Clerk.

18 (Title of Court and Cause.)

Appearance of John L. Flynn, United States Collector of Internal Revenue for the First District of California.

Comes now John L. Flynn, United States Collector of Internal Revenue for the First District of California, substituted as defendant in the above entitled action in the place of Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, in so far as the above entitled action is against the said Justus S. Wardell in his official capacity by an order of the above entitled court given, made and filed on the 14th day of February, 1921, and hereby appears in said action as such defendant by the undersigned, his attorneys.

FRANK M. SILVA,
United States Attorney,
Attorney for Defendants.

Endorsed: Filed Feb. 15, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

19 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Petition for Writ of Error.

To the Honorable the Judges of the United States District Court for the Northern District of California:

Now come the above named plaintiffs and file this, their petition for writ of error in the above entitled cause, and respectfully show:

I.

That on the 20th day of January, 1921, the said court made and entered its judgment in said cause in favor of defendants and against the plaintiffs.

II.

That the said case is a case that involves the construction of the Constitution of the United States.

III.

That the said case is a case that involves the application of the Constitution of the United States.

IV.

That the said case is a case in which the constitutionality of a law of the United States is drawn in question.

V.

That said case involves the constitutionality of the Federal Estate Tax Act, approved September 8, 1916, when applied retroactively to a transfer made before the passage of the said act and when applied to property rights and estates which became vested by transfer prior to the time that said act became effective, and when applied to the coming into possession of estates in remainder which had become fully vested in interest before said act became effective, and when applied to such estates in remainder fully vested in interest although there is no estate left by the decedent to be taxed.

VI.

That this is a proper case to be reexamined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, within the meaning of section 238 of the Judicial Code of the United States.

VII.

That in said judgment certain errors were committed to the prejudice of the plaintiffs, all of which will appear in detail from the assignment of errors which is filed with this petition.

Wherefore, plaintiffs pray that a writ of error in their behalf issue out of the Supreme Court of the United States directed to the United States District Court for the Northern District of California, and that said plaintiffs be allowed to prosecute the same in said Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be forwarded to the Supreme Court of the United States, and that an order be made fixing the amount of the supersedeas bond which said plaintiffs

shall give and furnish on said writ of error, and that upon
21 the giving of said bond all further proceedings be suspended, stayed and superseded until the determination of said writ of error by the Supreme Court of the United States.

GARRET W. McENERNEY,
BACIGALUPI & ELKUS,
ARTHUR D. THOMSON,
Attorneys for Plaintiffs.

Endorsed: Filed Apr. 5, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

22 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Assignment of Errors.

Now come the plaintiffs in the above entitled cause, and, in connection with their petition for writ of error in the above entitled cause, make the following assignment of errors which they aver occurred in said cause, and upon which they will urge their writ of error in the above entitled cause, to wit:

I.

The court erred in holding that the Federal Estate Tax Act, approved September 8, 1916, applies to the transfers alleged in the complaint, or applies to a transfer made prior to the passage of the said act, or applies to trusts in property created prior to the date said act became effective, or applies to property rights or estates which became vested by transfer before said act became effective or to the property described in the amended complaint herein.

II.

The Court erred in holding that the said act imposes a tax on the coming into possession of estates in remainder which were fully vested in interest prior to the passage of the said act.

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III.

The Court erred in holding that the said act should be construed to be retroactive, or to apply to any such transfer or to any such prior vested property rights or estates.

IV.

The court erred in holding that the stock described in the amended complaint herein was a part of the gross estate of Henriette Levy or that there was any gross estate or any estate left by Henriette Levy or that Henriette Levy at any time on or after January 7, 1907 owned or possessed any estate in any property of any kind whatsoever, that could survive her death.

V.

The court erred in holding that although there was no estate left by Henriette Levy upon her death that an estate could be constructively and retroactively created by holding the said stock transferred to the plaintiffs to be the estate of Henriette Levy.

VI.

The court erred in holding that any liability, secondary or otherwise, attached to the plaintiffs herein for the payment of a tax upon the transfers alleged in the amended complaint.

VII.

The court erred in holding that if the said act should be construed to be retroactive, or to be intended to be applied to a transfer made before the passage of the said act, or to property rights and estates which became vested by transfer prior to the time that the said act became effective, the said act would not be in violation of the Constitution of the United States.

VIII.

24 The court erred in holding that if the said act were so construed and applied it would not be in violation of the Constitution of the United States, in that the same would take the said property of the plaintiffs without due process of law, in violation of the fifth amendment to the Constitution of the United States.

VIII.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the same would take private property,

to wit: the said property of the said plaintiffs for a public use without just compensation, in violation of the fifth amendment to the Constitution of the United States.

IX.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the tax so imposed by the said act would not be a transfer tax or an indirect tax but would be a direct tax upon the property and the rights of property of the said plaintiffs, and as a direct tax upon the said property and rights the same would be in violation of article I, section 9, subdivision 4, of the Constitution of the United States, because not laid in proportion to census or enumeration as therein provided.

X.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the tax so imposed produces such gross and patent inequality as to be entirely beyond the scope of the taxing power of congress, and to transcend the legitimate exercise of the functions of government.

XI.

25 The court erred in holding that in making the said transfers on the said 19th day of December, 1902, on the 14th day of January, 1903 and on the 17th day of January, 1907, the said decedent made a transfer of any property in contemplation of or intended to take effect in possession or enjoyment at or after her death within the meaning of said Act of Congress.

XII.

The court erred in holding that the said properties so transferred on the 19th day of December, 1902, on the 14th day of January, 1903 and on the 17th day of January, 1907, did not become vested property rights of the said plaintiffs upon the execution of said transfers on said respective days and long prior to the passage of the said act.

XIII.

The court erred in holding that the said shares of stock so transferred on the 19th day of December, 1902, on the 14th day of January, 1903 and on the 17th day of January, 1907, were a part of the gross estate of the said Henriette Levy, within the meaning of the said act, and in holding that the same were subject to taxes thereunder.

XIV.

The court erred in sustaining the demurrer of the defendant to the plaintiffs' amended complaint.

XV.

The court erred in rendering judgment in favor of defendant and against the plaintiffs.

Wherefore, said plaintiffs pray that the judgment of said court be reversed.

GARRET W. McENERNEY,
BACIGALUPI & ELKUS,
ARTHUR D. THOMSON,
Attorneys for Plaintiffs.

Endorsed: Filed Apr. 5, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

26 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

On this 1st day of April, 1921, came the plaintiffs by their attorneys, and filed herein and presented their petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, and praying also that a transcript of the record, proceedings and papers, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

And it appearing that on the 20th day of January, 1921, the final judgment was entered in this cause in favor of defendants and against the plaintiffs, and that the said case is a case that involves the construction of the Constitution of the United States, and is a case that involves the application of the Constitution of the

United States, and is a case in which the constitutionality of a law of the United States is drawn in question, and is a case in which the constitutionality of the Federal Estate Tax Act of
27 September 8, 1916, when retroactively applied to a transfer made before the passage of said act and when applied to property rights and estates which became vested by transfer prior to the time that said act became effective, and when applied to the coming into possession of estates in remainder which had become fully vested in interest before said act became effective and when applied to such estates in remainder fully vested in interest although there is no estate left by the deceased to be taxed, is drawn in question, and that said case is a proper case to be reexamined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, within the meaning of section 238 of the Judicial Code of the United States.

In consideration whereof, it is hereby ordered that a writ of error, as prayed for in said petition, be allowed, and that the amount of the supersedeas bond to be given by the plaintiffs upon said writ of error be, and the same is hereby, fixed at the sum of five hundred ($500) dollars, and that upon the giving of said bond all further proceedings in said cause be suspended, stayed and superseded pending the determination of said writ of error by the Supreme Court of the United States.

Dated this 1 day of April, 1921.

FRANK H. RUDKIN,
District Judge.

Endorsed: Filed Apr. 5, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

28 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER, **Plaintiffs,**

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, **Defendants.**

Bond on Writ or Error.

Know all men by these presents, Harriet L. Levy, Pauline Jacobs and Adeline Salinger, as principals, and F. Rolandi and Eugene S. Elkus, as sureties, are held and firmly bound unto Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector

of Internal Revenue for the First District of California, in the full and just sum of Five Hunderd Dollars ($500), to be paid to the said Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of April, 1921, in the year of our Lord one thousand nine hundred and twenty-one.

29 Whereas, lately in the District Court of the United States for the Northern District of California, in a suit pending in said court between Harriet L. Levy, Pauline Jacobs and Adeline Salinger, plaintiffs, and Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, defendants, a judgment was rendered against the said plaintiffs, and said plaintiffs have sued out a writ of error from the Supreme Court of the United States to the District Court of the United States for the Northern District of California to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them and each of them to be and appear at a session of the Supreme Court of the United States to be held in the City of Washington, District of Columbia, within sixty days after the service of said citation.

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof, the parties herein named as principals and sureties have caused these presents to be executed this 5th day of April, 1921.

ADELINE SALINGER,
HARRIET L. LEVY,
PAULINE JACOBS,
As Principals.

F. ROLANDI,
EUGENE S. ELKUS,
As Sureties.

30 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

F. Rolandi and Eugene S. Elkus, being first duly sworn, each for himself deposes and says:

That he is a resident and householder within the State of California, and is worth the sum specified in the foregoing undertaking, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

F. ROLANDI.
EUGENE S. ELKUS.

Subscribed and sworn to before me this 5th day of April, 1921.

[SEAL.] THOMAS S. BARNES,
Notary Public in and for the
City and County of San Francisco,
State of California.

The foregoing bond is hereby approved this 5 day of Ap'l, 1921.

HUNT,
District Judge.

Endorsed: Filed Apr. 5, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

31 (Title of Court and Cause.)

Præcipe for Record on Writ of Error.

To the Clerk of said Court:

SIR:

Please prepare record on writ of error to contain the following:

1. Amended Complaint.
2. Demurrer to Amended Complaint.
3. Order sustaining Demurrer.
4. Judgment.
5. Order adding party defendant.
6. Appearance of John L. Flynn.
7. Petition for Writ of Error.
8. Assignment of Errors.
9. Order allowing Writ of Error and fixing amount of Supersedeas Bond.
10. Bond on Writ of Error.
11. This Præcipe.
12. Writ of Error.
13. Citation.
14. Affidavit of mailing of copies on Solicitor General and affidavit of service on Frank M. Silva.

GARRET W. McENERNEY,
BACIGALUPI & ELKUS,
ARTHUR D. THOMSON,
Attorneys for Plaintiffs.

Dated April 7th, 1921.

Endorsed: Filed Apr. 7, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

32 In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 16318.

HARRIET L. LEVY et al. Plaintiffs,

vs.

JUSTUS S. WARDELL, U. S. Collector, etc., et al., Defendants.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing thirty-one (31) pages, numbered from 1 to 31, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the præcipe for record on writ of error, as the same remain on file and of record in the above entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $13.05; that said amount was paid by the plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of April, A. D. 1921.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

33 In the United States District Court for the Northe
District of California, Southern Division, Second D
vision.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER,
Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Reven
for the First District of California, and John L. Flynn, Unit
States Collector of Internal Revenue for the First District
California, Defendants.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorab
the Judges of the District Court of the United States for th
Northern District of California, Greeting:

Because in the record and proceedings, as well as in th
rendition of the judgment of a plea which is in the District Cou
of the United States for the Northern District of California, b
fore you, or some of you, between Harriet L. Levy, Pauline Jaco
and Adeline Salinger, plaintiffs, and Justus S. Wardell, Unit
States Collector of Internal Revenue for the First District
California, and John L. Flynn, United States Collector of I
ternal Revenue for the First District of California, Defendant
being a case that involves the construction and application of th
Constitution of the United States, and being a case in which th
constitutionality of a law of the United States is drawn in questio
a manifest error hath happened to the great damage
34 plaintiffs, as by their complaint appears. We being willi
that error, if any hath been, should be duly corrected, an
full and speedy justice done to the parties aforesaid in this behal
do command you, if judgment be therein given, that then und
your seal, distinctly and openly, you send the record and proce
ings aforesaid, with all things concerning the same, to the Supre
Court of the United States, together with this writ, so that yo
have the same in the Supreme Court at Washington, within six
days from the date hereof that the record and proceedings afor
said being inspected, the said Supreme Court may cause further
be done therein to correct that error, what of right, and accor
ing to the laws and custom of the United States, should be don

Witness, the Hon. Edward D. White, Chief Justice of the United States, the 5th day of April, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California,
By J. A. SCHAERTZER,
Deputy Clerk.

Allowed by:

——— ———,
United States District Judge.

34½ [Endorsed:] No. 16318. In the United States District Court for the Northern District of California, Southern Division, Second Division. Harriet L. Levy, Pauline Jacobs, and Adeline Salinger, Paintiffs, vs. Justus S. Wardell, et al., Defendants. Writ of Error. Filed Apr. 7, 1921. W. B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk. Arthur D. Thomson, Bacigalupi & Elkus, Attorneys at Law, 806 Bank of Italy Building, Montgomery and Clay Sts., San Francisco, Cal.

35 *Return to Writ of Error.*

The Answer of the Judge of the District Court of the United States in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

36 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Greeting:

You and each of you are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held at the City of Washington, District of Columbia, on the 31st day of May, 1921, pursuant to a writ of error on file in the clerk's office of the District Court of the United States for the Northern District of California, in that certain action, No. 16318, wherein Harriet L. Levy, Pauline Jacobs and Adeline Salinger are plaintiffs in errors, and you, Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, *and John J. Flynn, United States Collector of Internal Revenue for the First District of California,*
37 are defendants in error, to show cause, if any there be, why the judgment given, made and entered against the said plaintiffs in error in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Judges of the District Court of the United States for the Northern District of California, this 1st day of April, in the year of our Lord one thousand nine hundred and twenty-one.

FRANK H. RUSH,
District Judge.

Attest:

—— ——, [SEAL.]
Clerk of the United States District Court for the Northern District of California.

37½ [Endorsed:] No. 16318. In the United States District Court for the Northern District of California, Southern Division, Second Division. Harriet L. Levy, Pauline Jacobs and Adeline Salinger, Plaintiffs, vs. Justus S. Wardell, et al., Defendants. Citation Bacigalupi & Elkus, Attorneys at Law, 806 Bank of Italy Building, Montgomery and Clay Sts., San Francisco, Cal.

38 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER, Plaintiffs,

—

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Affidavit of Service.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Peter S. Sommer, being first duly sworn, deposes and says: That he is a citizen of the United States and over the age of twenty-one years, and not a party to the within entitled action; that on the 6th day of April, 1921, he personally served the within citation upon Frank M. Silva, United States District Attorney for the Northern District of California, by exhibiting the within original citation to the said Frank M. Silva as such United States District Attorney, and by delivering to him a copy of the same; that the said Frank M. Silva as such United States District Attorney for the Northern District of California is the attorney of record in the within entitled action for each of the defendants named therein.

PETER S. SOMMER.

Subscribed and sworn to before me this 7th day of April, 1921.

[Seal of the U. S. District Court, Northern Dist. of California.]

J. A. SCHAERTZER,
Deputy Clerk U. S. District Court,
Northern District of California.

38½ [Endorsed:] No. 16318. In the United States District Court for the Northern District of California, Southern Division, Second Division. Harriet L. Levy, et al., Plaintiffs, vs. Justus S. Wardell et al., Defendants. Affidavit of Service. Bacigalupi &

Elkus, Attorneys at Law, 806 Bank of Italy Building, Montgomery and Clay Sts., San Francisco, Cal.

39 In the United States District Court for the Northern District of California, Southern Division, Second Division.

No. 16318.

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER, Plaintiffs,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants.

Affidavit of Mailing.

Peter S. Sommer, being duly sworn, deposes and says: That he is a male citizen of the United States, over the age of Twenty-one years, not interested in and capable of being a witness in the above entitled matter.

That on the 6th day of April, 1921, he addressed to the Solicitor General of the United States at Washington, District of Columbia, in the United States of America, by registered mail prepaid a copy of the following documents in the matter of Harriet L. Levy, Pauline Jacobs and Adeline Salinger, Plaintiffs, vs. Justus S. Wardell United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California, Defendants:

Writ of Error,
Bond on Writ of Error,
Petition for Writ of Error,
Assignment of Errors,
Order Allowing Writ of Error and Fixing amount of Supersedeas Bond, and
40 Citation,

from the United States District Court for the Northern District of California, Southern Division, Second Division, to the United States Supreme Court.

That the aforesaid documents so addressed as aforesaid were enclosed in a sealed envelope and on said day deposited by affiant in the United States Postoffice at the City and County of San Francisco, State of California, United States of America, with postage prepaid.

PETER S. SOMMER.

Subscribed and sworn to before me, this 7th day of April, 1921.

[Seal of the U. S. District Court, Northern Dist. of California.]

J. A. SCHAERTZER,
Deputy Clerk U. S. District Court,
Northern District of California.

41 [Endorsed:] No. 16318. In the United States District Court for the Northern District of California, Southern Division, Second Division. Harriet L. Levy, et al., Plaintiffs, vs. Justus S. Wardell, et al., Defendants. Affidavit of Mailing. Filed Apr. 7, 1921. W. B. Maling Clerk, by J. A. Schaertzer, Deputy Clerk. Bacigalupi & Elkus, Attorneys at Law, 806 Bank of Italy Building, Montgomery and Clay Sts., San Francisco, Cal.

Endorsed on cover: File No. 28,240. N. California D. C. U. S. Term No. 883. Harriet L. Levy, Pauline Jacobs, and Adeline Salinger, plaintiffs in error, vs. Justus S. Wardell, United States collector of internal revenue for the first district of California, and John L. Flynn, United States collector of internal revenue for the first district of California. Filed April 19th, 1921. File No. 28,240.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1921

No. 303

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER,

Plaintiffs in Error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and JOHN L. FLYNN, United States Collector of Internal Revenue for the First District of California,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

EDWARD F. TREADWELL,
Attorney for Plaintiffs in Error.

Topical Index

Table of Cases Cited.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1921

No. 303

HARRIET L. LEVY, PAULINE JACOBS and ADELINE SALINGER,
Plaintiffs in Error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, and JOHN L. FLYNN, United States Collector of Internal Revenue for the First District of California,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

The Facts and Questions Involved.

Plaintiffs sue to recover $12,460.84 paid the Collector of Internal Revenue as an "Estate Tax" under the act of September 8, 1916 (39 Stat. L. 777).[1] A general

(1) A copy of the act of 1916 with the amendments of 1917 and 1919, will be found in an appendix to this brief.

demurrer to the complaint was sustained. The facts admitted by the demurrer are that Henriette Levy on December 19, 1902, and January 14, 1903, transferred certain shares of stock in a corporation to the plaintiffs. The shares were transferred on the books of the company, and new certificates issued to the plaintiffs. After the transfer the plaintiffs exercised the full rights of stockholders in the corporation. The transfer was complete and without condition and there were no stipulations or conditions under or by which the said Henriette Levy would ever be entitled to a return of said stock, or any portion thereof and she retained no legal interest whatever in or to or with respect to the same, nor did she retain any right of testamentary disposition of the stock, or any legal right whatsoever over the stock, or any right of revocation. At the time of the transfer, she was in good health and not in expectation of death. The sole and exclusive object of the transfer was to avoid the burden of business care, worry and management and control of her properties, and to vest in plaintiffs irrevocable present rights of ownership in the stock. The transfer was not made in contemplation of, or intended to take effect in possession or enjoyment at or after the death of Henriette Levy, unless it is made so by the agreement made at the time of the transfer by which the plaintiffs promised and agreed with Henriette Levy that they would pay to her the dividends on said stock during her lifetime.

Henriette Levy died on December 15, 1916. *She left no estate whatever, there was no administration on her*

estate and the shares in question never came into her "estate".

Notwithstanding these facts, an "estate tax" was levied *against the plaintiffs* (the transferees), based on the value of the stock in question at the death of the grantor. To prevent a threatened levy on the stock the tax was paid *by plaintiffs* under protest and this action brought to recover the same. The complaint alleges that at the time of the transfer of the stock in 1902 it was worth $10.00 a share and that at the time of the death of the decedent in 1916 it was worth approximately $20.00 per share. The tax was assessed on the value of the stock at the time of the death of the decedent, which will be noted is double the value at the time of the transfer.

It will be noted that the theory of the government is that by reason of the agreement to pay the grantor the dividends on the stock during her life, the transfer became one intended to take effect *in enjoyment* at or after death; that such a transfer is taxable although made fourteen years before the passage of the act imposing the tax and this although the grantor left no estate whatever, and that such tax may be enforced against the transferees and the property transferred. On the contrary we claim:

1. That the act should not be construed to be retroactive or to tax a transfer made prior to its passage;

2. That if construed as being intended to tax such a transfer, it would be unconstitutional for various reasons;

3. That even if a tax could be, and was by the act intended to be, levied on the estate left by the decedent with respect to the property left and also with respect to the property transferred, no such tax could be or was intended to be enforced against the transferees under a transfer made before the passage of the act;

4. Even if the provisions of the act (secs. 201-208) imposing upon the decedent, or on his estate, or on the property left by him, or on his executors, a tax with respect to a transfer made *inter vivos* be construed to be retroactive, the provision of the act (sec. 209) imposing a tax on the property transferred and on the transferees cannot be construed to be retroactive;

5. That the tax levied on the basis of the value of the property at the date of the death of the decedent was at all events erroneous as that was double the value of the property at the time of the transfer.

Assignment of Errors.

I.

The court erred in holding that the Federal Estate Tax Act, approved September 8, 1916, applies to the transfers alleged in the complaint, or applies to a transfer made prior to the passage of the said act, or applies to trusts in property created prior to the date said act became effective, or applies to property rights or estates which became vested by transfer before said act became effective or to the property described in the amended complaint herein.

II.

The court erred in holding that the said act imposes a tax on the coming into possession of estates in remainder which were fully vested in interest prior to the passage of the said act.

III.

The court erred in holding that the said act should be construed to be retroactive, or to apply to any such transfer or to any such prior vested property rights or estates.

IV.

The court erred in holding that the stock described in the amended complaint herein was a part of the gross estate of Henriette Levy or that there was any gross estate or any estate left by Henriette Levy or that Henriette Levy at any time on or after January 7, 1907, owned or possessed any estate in any property of any kind whatsoever, that could survive her death.

V.

The court erred in holding that although there was no estate left by Henriette Levy upon her death that an estate could be constructively and retroactively created by holding the said stock transferred to the plaintiffs to be the estate of Henriette Levy.

VI.

The court erred in holding that any liability, secondary or otherwise, attached to the plaintiffs herein for the payment of a tax upon the transfers alleged in the amended complaint.

VII.

The court erred in holding that if the said act should be construed to be retroactive, or to be intended to be applied to a transfer made before the passage of the said act, or to property rights and estates which became vested by transfer prior to the time that the said act became effective, the said act would not be in violation of the Constitution of the United States.

VIII.

The court erred in holding that if the said act were so construed and applied it would not be in violation of the Constitution of the United States, in that the same would take the said property of the plaintiffs without due process of law, in violation of the fifth amendment to the Constitution of the United States.

VIII.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the same would take private property, to wit: the said property of the said plaintiffs for a public use without just compensation, in violation of the fifth amendment to the Constitution of the United States.

IX.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the tax so imposed by the said act would not be a transfer tax or an indirect tax but would be a direct tax upon the property and the rights of property of the said plaintiffs, and as a direct tax upon the said property and rights the same would be in violation of article I, section 9, subdivision 4, of the Constitution of the United States, because not laid in proportion to census or enumeration as therein provided.

X.

The court erred in holding that if the said act should be so construed and applied it would not be in violation of the Constitution of the United States, in that the tax so imposed produces such gross and patent inequality as to be entirely beyond the scope of the taxing power of congress, and to transcend the legitimate exercise of the functions of government.

XI.

The court erred in holding that in making the said transfers on the said 19th day of December, 1902, on

the 14th day of January, 1903, and on the 17th day of January, 1907, the said decedent made a transfer of any property in contemplation of or intended to take effect in possession or enjoyment at or after her death within the meaning of said Act of Congress.

XII.

The court erred in holding that the said properties so transferred on the 19th day of December, 1902, on the 14th day of January, 1903, and on the 17th day of January, 1907, did not become vested property rights of the said plaintiffs upon the execution of said transfers on said respective days and long prior to the passage of the said act.

XIII.

The court erred in holding that the said shares of stock so transferred on the 19th day of December, 1902, on the 14th day of January, 1903, and on the 17th day of January, 1907, were a part of the gross estate of the said Henriette Levy, within the meaning of the said act, and in holding that the same were subject to taxes thereunder.

XIV.

The court erred in sustaining the demurrer of the defendant to the plaintiffs' amended complaint.

XV.

The court erred in rendering judgment in favor of defendant and against the plaintiffs.

Argument.

The first two questions above stated are fully argued in the briefs in *Shwab v. Doyle,* October term, 1921, No. 200, and *Union Trust Co. v. Wardell,* October term, 1921, No. 236, and we feel that it would impose an undue burden on the court to restate that argument

here. We, therefore, ask to be permitted to submit those questions on the argument there made.

This case differs from both of those cases in this, that in the case at bar the deceased left no property at all upon her death, and, therefore, if the tax may be imposed, it must be upon the property transferred prior to the passage of the act, or upon the owners thereof by reason of such transfer; and we confidently assert and shall here argue:

That even if a tax could be, and was by the act intended to be, levied on the estate left by the decedent with respect to the property left and also with respect to the property transferred, no such tax could be or was intended to be levied on the transferees of property transferred before the passage of the act.

Even if the provisions of the act (sections 201-208) imposing upon the decedent, or on his estate, or on the property left by him, or on his executors, a tax with respect to a transfer made inter vivos be construed to be retroactive, the provision of the act (section 209) imposing a tax on the property transferred and on the transferees cannot be construed to be retroactive.

The entire estate tax act will be found in an appendix to this brief. It is sufficient here to point out that section 209 is the only section imposing any tax on the transferees and its language is clearly only prospective, viz.:

> "If the deceased *makes* a transfer of, or *creates* a trust, with respect to any property", etc.

1.

THE GOVERNMENT ARGUED IN THE DISTRICT COURT IN UNION TRUST CO. v. WARDELL (No. 236 ON THE PRESENT DOCKET) THAT THE ACT OF SEPTEMBER 8, 1916, WAS SUSCEPTIBLE OF THE CONSTRUCTION THAT IT LAID A TAX ONLY ON THE TRANSFER OF THE ASSETS OF THE DECEDENT POSSESSED AT DEATH, AND USED VALUES OF PROPERTIES CONVEYED INTER VIVOS MERELY TO MEASURE IN PART THE TAX THUS IMPOSED.

Before presenting our argument on this subject, it should be noted that the Government in the cases above referred to contended in the trial courts that sections 201 and 202 of the act might be construed as not to impose any tax on the transfer of property transferred by the decedent during his lifetime, but as imposing the tax entirely upon the transfer of the property left by the decedent, merely measured in part by the property transferred during life. The result of this contention would be that if the decedent left no property, as in the case at bar, no tax was thereby imposed on the property transferred by the decedent in his lifetime or upon his transferees. Of course, that argument of the Government is destructive of its claim in the case at bar. While we do not agree with the entire argument made by the Government in this particular, there are features in it which support the position which we do take in this case, and therefore as preliminary to our argument we here reproduce the argument of the Government on that subject:

ARGUMENT OF GOVERNMENT IN UNION TRUST CO. v. WARDELL.

The statute may be construed as imposing in section 201, a tax upon the transfer of the estate of which decedent was seized at death; which tax is "to be determined" (i. e., measured) "as provided in section 203", and so construed it is no objection to the validity of the tax (as an excise tax laid upon the transfer) that the formula for measuring the tax takes into account items of value that would be immune from direct taxation.

There is, independently of all other reasons presented for affirming the validity of the statute, ample basis for construing the act as imposing the tax upon the transfer of the "net estate" of which decedent died seized; such tax in accordance with the provisions of sections 202 and 203 of the act to be measured by including for the purpose of ascertaining the amount of the tax, the value of property conveyed in contemplation of death and of property of which transfers have been made and trusts created to take effect in possession or enjoyment at or after death.

No good reason is perceived why this rule may not be applied, sanctioned as it is by a long line of federal precedents involving analogous statutes. We point out hereafter, the close analogy between this form of tax and taxes on corporate franchises and on the privilege of "doing business". This close analogy has long been recognized. In *Plummer v. Coler*, 178 U. S. 115; 44 L. Ed. 988, 1008, the court said:

> "In assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of federal securities, does not invalidate the tax or the law under which it is imposed.
>
> "Passing from the authorities, let us briefly consider some of the arguments advanced in the able and interesting brief filed in behalf of the plaintiff in error.
>
> "The propositions chiefly relied on are, first, that an inheritance tax, if assessed upon a legacy or interest composed of United States bonds, is within the very letter of the United States statute which declares that such bonds 'shall be exempt from taxation in any form by or under

state, municipal, or local authority', and, second, that the tax in question is unconstitutional, because impairing and burdening the borrowing power of the United States.

"But if the first proposition is sound and decisive of the question in this case, then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises the amount of such a tax may be based upon the entire property or capital possessed by the corporation, even when composed in whole or in part of United States bonds, must be overruled. Plainly in those cases, as in this, there was taxation *in a form*, and in them, as in this, *the amount of the tax was reached by including in the assessment United States bonds.*"

It should be observed that the tax herein imposed is not a tax "upon the donor". It is no more imposed upon the person than it is upon the property. It is a tax "upon the transfer" of property. True, most "transfers" enumerated in the statute, are those which take effect under the laws of descent and distribution. But other forms of transfer are also embraced. This grouping of taxable subjects or "occasions" has the sanction of long usage. It is the scheme adopted in the English statutes and copied in the acts of Congress as early as 1864.

It is to be observed that, in the attempt to analyze and fix upon terms which describe the property interests reached by the tax, the most accurate definitions are those which recognize the fact that the tax reaches the interest "which ceased by reason of the death" of the decedent.

This is recognized in *Knowlton v. Moore*, 178 U. S. 41, 48-9; 44 L. ed. 969, 973, where the court said:

"In 1853 the probate tax duty and the legacy tax just referred to, were supplemented by a tax known as the succession duty. This law reached interests in real estate passing or acquired by the death of a person and interests in personal property not covered by the Legacy Act. This also was not treated as an expense of administration, but was charged upon and collected out of the particular interests subjected to the tax.

"The nature of the succession duty is shown by the second section of the act defining the same, which is thus condensed by Hanson at page 40 of his treatise:

" 'Succession duty is a tax placed on gratuitous acquisition of property which passes on the death of any

person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor). Property chargeagle with this tax is called a succession.'

"By the Finance Act of 1894, the probate duty was superseded by what was termed the estate duty. This, like the probate duty, was a tax distinct from those imposed by the legacy and succession duty acts upon the receipt of real or personal property, or an interest therein, although in some administrative features it modified or regulated the subject of a succession duty. This tax is payable out of the general revenue of the estate. *Re Bourne* (1893), 1 Ch. 188, cited by Hanson at p. 354.

"The principle upon which the tax rests is thus stated by Hanson at p. 63:

"'The new duty imposed by the Finance Act, and called estate duty, as has been said above, supersedes probate duty; but the key to the construction of the Finance Act lies in remembering that the new estate duty, although it is levied on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. *What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.* Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the Act to revert to principles of succession duty which have no real connection with the subject.'

"This summary suffices to indicate the origin, the development, and the theory underlying death duties.

* * *

"A retrospective study of the death duty laws enacted in our own country, national and state, will show that they rest upon the same fundamental conception which has caused the adoption of like statutes in other countries; and especially in their national development do they substantially conform (to the extent to which they go) to the evolution of the system in England."

And in the recent decision in *Cole v. Nickel*, 177 Pac. Rpr. 409, 413, the Nevada court approved this definition. The court said:

"The language of the statute manifests its purpose to tax all transfers which are accomplished by will, the intestate laws, and those made prior to death, which can be classed as similar in nature and effect, because they accomplish a transfer of property under circumstances

which impress on it the characteristics of a devolution made at the time of the donor's death. *State v. Pabst, supra.*

"But it is earnestly insisted that, as the transfer of the property was made before the act became effective no tax accrued. This leads to the discussion of the question: When does a transfer tax as imposed by the statute accrue? To this there can be but one answer—at the death.

"Says Chief Justice White, in *Knowlton v. Moore*, 178 U. S. 56; 20 Sup. Ct. 753; 44 L. Ed. 976:

"'* * * Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.'

"From this we conclude that the *statute taxes, not the interest to which some persons succeed on a death, but the interest which ceased by reason of the death. Knowlton v. Moore, supra;* Hanson's Death Duties, p. 63. Had Henry Miller died testate or intestate between the enactment and taking effect of the act, no tax would accrue; but the weakness of the appellants' position in this connection is that the property did not vest until after the statute became effective. The actual possession or enjoyment by those entitled to Miller's bounty under the will and deed was postponed to take effect at or after his death."

We can see no necessity for speculating with regard to the operation of the tax as it *affects* either the person or property.

Nothing is better settled than that it is not imposed upon the person nor upon the property. Of course it affects persons or their estates and the amount is measured by computing property values, which is true of most excise taxes. In the plaintiffs brief, however, the references to taxing the *donor or donee imply that if one is affected* by a tax it is a personal tax. If the tax be levied upon a properly selected taxable occasion, it is a valid excise tax without regard to the fact that it may finally be paid out of the same funds which would be used to discharge a direct tax.

The view that it is the interest "which ceases at death" which is taxed is a more nearly accurate conception than that the donor is taxed. The act of September 8th, 1916,

imposes the tax *upon the transfer* and it has the secondary effect of taxing certain interests which cease at the death of the decedent. We think this is a conception that applies with peculiar fitness to interests vesting in possession and enjoyment in the beneficiaries at the death of the decedent no matter when the instrument creating such interests was executed.

We desire at this time especially to direct attention to the analogy between the statute in question and the Corporation Tax Act of 1909.

A very close parallel exists between the scheme provided for measuring the tax in section 201 and the following sections of the act of September 8, 1916, and the provisions of the act of August 5, 1909, known as the Federal Corporation Tax Act.

So much of section 38 of that act as is necessary in order to indicate the similarity of the scheme of taxation therein provided with the act of September 8, 1916, follows:

> "Sec. 38. That every corporation * * * organized for profit and having a capital stock represented by shares * * * organized under the laws of the United States or any state * * * and engaged in business in any state * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to 1 per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year exclusive of amounts received by it as dividends upon stock of other corporations * * * subject to the tax hereby imposed.
>
> "Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties. * * *" (36 St. L. 112.)

Note that under the act of August 5, 1909, the tax imposed is the "equivalent" of a fixed percentage of the "entire net income". But the tax is to be "ascertained" according to a formula in its essentials closely resembling the formula prescribed by section 202 of the act of September 8, 1916.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107; 146-147, the formula for computing the tax under the 1909 act is thus described:

> "Under the second paragraph the net income is to be ascertained by certain deductions from the gross amount of income received within the year 'from small sources'; and the return to be made to the Collector of Internal Revenue under the third section is required to show the gross amount of the income received during the year 'from all sources'. The evident purpose is to secure a return of the entire income, with certain allowances and deductions which do not suggest a restriction to income derived from property actively engaged in the business. This interpretation of the act, as resting upon the doing of business, is sustained by the reasoning in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, in which a special tax measured by the gross receipts of the business of refining oil and sugar was sustained as an excise in respect to the carrying on or doing of such business."

Notwithstanding the fact that the tax was fixed at a stated percentage of the "net income" it is settled that it is not a tax upon "net income". The amount of the income is merely used as the measure of the tax.

Without conceding that even though the transfer was vested during the lifetime of the donor of the trust and prior to the enactment of the statute that a tax could not be retroactively imposed it is plain that a decision of that point is unnecessary if the true construction of the act is that the tax is imposed upon the estate of which the decedent died seized, the amount of the tax to be measured by including in arriving at the value of the gross estate, the value of all property "to the extent of any interest therein of which decedent has at any time made a transfer or with respect to which he has created a trust intended to take effect in possession or enjoyment at or after his death" as provided in section 202 (b).

It was determined by the Supreme Court in construing the Corporation Tax Act that inasmuch as the tax was not upon the "net income", but was upon the privilege of doing business, *measured by the amount of the net income* ascertained in accordance with the act, that it was immaterial that a part of such net income was made up from the income of non-

taxable bonds. Referring to this question in the case of *Flint v. Stone Tracy Co., supra*, the court said:

> "It is contended that it is not valid, certainly so far as the tax is measured by the income from bonds non-taxable under federal statutes, and of municipal and state bonds beyond the federal power of taxation. And so of real and personal estates, because as to such estates the tax is direct, and required to be apportioned according to population among the states. It is insisted that such must be the holding unless this court is prepared to reverse the income tax cases decided under the act of 1894. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429; s. c. 158 U. S. 601."

But it was decided that the fact that income which was taken into account in arriving at the "gross income" included that derived from non-taxable bonds was no reason for not measuring the tax by applying the formula of the statute. If we assume it to be true that for any reason it lies outside of the domain of Congress to tax the vesting in full possession and enjoyment of property because the deed or will which transferred or created the right antedates the passage of the act, at least there can be no objection to including the value of such property in measuring the amount of tax, just as non-taxable income from bonds was included under 1909 act.

In the case of *McCoach v. Minehill Railway Company*, 228 U. S. 295, 306-7, the court said:

> "In the Flint case, in sustaining the act of 1909 as a tax upon the privilege of doing business in corporate form, against the objection *that it includes within its reach the income of real estate and personal property not used in the business and not the subject of taxation, the court said* (220 U. S. 163): *'The measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable'.* And again, after referring to previous decisions (220 U. S. 165): 'It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable'.

"Applying that doctrine in this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. * * * The tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does."

So, in the case of *Peck v. Lowe* (decided May 20, 1918), 247 U. S. 165, where it was contended that the tax was not properly levied upon the income of a corporation engaged in the export business, the court said:

"It (the tax) is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes."

In the case of *Anderson v. Forty-Two Broadway Co.*, 239 U. S. 69, 72, the court, pointing out that notwithstanding the use of the phrase "entire net income", the tax was not levied upon income at all but the income was only a measure of the tax, said:

"As has been repeatedly pointed out by this court in previous cases (*Flint v. Stone Tracy Co.*, 220 U. S. 107, 145, 150, 151; *McCoach v. Minehill Railway*, 228 U. S. 295, 306, *et seq.*; *United States v. Whitridge*, 231 U. S. 144), the act of 1909 was not in any proper sense an income tax law, nor intended as such, but was an excise upon the conduct of business in a corporate capacity, *the tax being measured by reference to the income in a manner prescribed by the act itself*. And it is very clear, from a reading of section 38, that the phrase 'entire net income', as used in its first paragraph, has no other meaning than that which is particularly set forth in the second paragraph, which declares in terms, how 'such net income shall be ascertained'."

In the case of *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 112, the Chief Justice said:

"The contention is that as the tax here imposed is not on the net product but in a sense somewhat equivalent to a tax on the gross product of the working of the mine by the corporation, therefore, the tax is not within the purview of the Sixteenth Amendment and consequently it must be treated as a direct tax on property because of its ownership and as such void for want of apportionment. But aside from the obvious error of the proposition intrinsically considered, it manifestly disregards the fact that by the previous ruling it was settled that the provisions of the Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is by testing the tax not by what is was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed."

It was held by the Supreme Court in *United States v. Perkins*, 163 U. S. 625, 630, in construing the New York Inheritance Tax Act that a tax upon a legacy bequeathed by the testator to the United States might be lawfully collected by the State of New York, viz.:

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a dimunition to the amount of the tax, and it is only upon this condition that the Legislature assents to a bequest of it."

In the case of *Keeney v. New York*, 222 U. S. 525, 534-5, the New York Inheritance Tax Act was again under consideration. In that case, Susan A. Keeney on June 13, 1903, made a trust conveyance with a reservation of a right to revoke after six months' notice. Part of the tax was upon property outside of the State of New York. The court answering some of the objections which were urged said:

"Wherever the amount of a tax is, as here, to be measured by the value of the property, it has been earnestly argued that it was to tax the property itself, and that

> *to ignore that feature is to put the name above the fact.* But when the state decides to impose such a tax the amount must be determined by some standard. To require the same amount to be paid on all transfers is not so fair as to impose the burden in proportion to the value of the property. *An excise on transfers therefore does not lose that character because the amount to be paid is determined by the values conveyed.* In view of the decisions in *Magoun v. Illinois Trust Bank*, 170 U. S. 283, and other cases already cited, it is unnecessary to review the arguments pro and con, and again point out the distinction which has been made and sustained between excises and ad valorem taxes. We therefore accept the conclusion of the Court of Appeals of New York that the statute of that state imposing a tax on the transfers of property 'intended to take effect in possession or enjoyment at or after the death of grantor' is 'not a property tax, but in the nature of an excise tax on the transfer of property'. 194 N. Y. 281."

In the case of *Plummer v. Coler*, 178 U. S. 115, the following headnote accurately states the decision:

> "The right to take property by will or descent is derived from and regulated by municipal law; and in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and the incidental fact that such property is composed, in whole or in part, of federal securities, does not invalidate the state tax, or the law under which it is imposed."

A similar question was decided by the Supreme Court, October 27, 1919, in the case of *Maxwell v. Bugbee*, found in the November 15, 1919, Advance Opinions published by the Lawyers' Co-operative Publishing Co. [250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. 2].

There it was argued that the New Jersey inheritance tax law was invalid because there was computed in measuring the value of the taxable estate, property beyond the jurisdiction of the New Jersey authorities. But following the general rule, it was declared that the privilege to succeed to property was taxable upon a different basis from property that was subject to direct taxation, and that in such a case, property not in itself taxable by the state, may be used as a measure of the tax imposed. The court said:

"It is next contended that the effect of including the property beyond the jurisdiction of the state in measuring the tax, amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the state.

"It is not to be disputed that, consistently with the federal Constitution, a state may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a *privilege to succeed to property* which is within the jurisdiction of the state. When the state levies taxes within its authority, *property not in itself taxable by the state may be used as a measure of the tax imposed.* This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 232; 60 L. ed. 617, 619; 36 Sup. Ct. Rep. 261. After deciding that the privilege tax there involved did not impose a burden upon interstate commerce, this court held that it was not, in substance and effect, a tax upon property beyond the state's jurisdiction, although a large amount of the property which was referred to as a measure of the assessment was situated outside of the state. In the present case the state imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. * * *

"To say that to apply a different rule regulating succession to resident and nonresident decedents is to levy a tax upon foreign estates *is to distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it.*"

The property transferred in contemplation of or to take effect in possession or enjoyment at or after the death of the decedent is merely used to measure the amount of the tax on the net estate of the decedent passing at her death.

The plaintiffs contend that if the act of September 8, 1916, is construed as taxing the transfer of property which vested in interest prior to the date upon which the act became effective, it is unconstitutional for the reasons that it would be (1) taking of property without due process of law; (2) a taking of private property for public use without just compensation, and (3) a direct tax, and not a transfer tax, and unconstitutional because not laid in proportion to population.

It is submitted that the plaintiffs' contentions are founded on an erroneous interpretation of the act. Sections 201, 202 and 203 of the act of September 8, 1916, must be read and construed together. Section 201 provides

> "That a tax * * * is hereby imposed upon the *transfer of the net estate* of every decedent dying after the passage of this act."

The amount of this tax is to be measured by the value of an assumed net estate; assumed solely for the purpose of measuring the tax on the net estate which is actually transferred. Sections 202 and 203 provide the manner in which the value of this assumed net estate is to be determined. It is to be computed by including the value at the time of the decedent's death of all of his property, real or personal, tangible or intangible, wherever situated; to the extent of the interest therein of the decedent at the time of his death; to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death, where there was no *bona fide* consideration; to the extent of the interest of the decedent in property held jointly with any other person; less certain deductions provided for in section 203.

Thus it appears that while the tax itself is imposed upon the transfer of the net estate of the decedent—passing or transferred at his death—the measure of the tax is not necessarily the value of the net estate so transferred. It is the value of the assumed net estate which measures the amount of the tax. This cannot be less than the value of the true net estate which is actually transferred, but may be considerably greater. Thus, the transfer of property intended to take effect in possession or enjoyment at or after the death of the decedent is not taxed, nor is this property itself taxed, but the value of such property is taken into consideration in measuring the amount of the tax assessed on the transfer of the estate actually passing on the decedent's death.

This is the interpretation placed upon the statute by the United States District Court for the Western District of Michigan in the recent case of *Shwab, Executor, v. Doyle, Collector*, No. 2981. In the case, substantially the same question

was presented to the court as in the instant case. The court said in part:

> "The claim of plaintiff that the tax here in controversy was imposed and collected unlawfully and without authority rests primarily upon the assumption that such tax was one upon the transfer of the trust property conveyed by the decedent, Mrs. Dickel, to the Detroit Trust Company, in April, 1915, or between the dates of the 21st day of April and the 3rd day of June, 1915, and hence from fifteen to seventeen months prior to the enactment of the statute under which the tax was levied. The claim is that the transfer or creation of the trust was a transaction completed more than a year before the tax law went into effect. * * *
>
> "The title to the trust fund was vested absolutely in the trustee and the rights of the beneficiaries under the trust apparently became fully vested at the time of the execution and delivery of the trust conveyance. The contention is that no power resided in Congress to levy a tax retrospectively upon that transfer was violative of rights which are protected by the federal Constitution.
>
> "If the tax here in controversy was not imposed upon the transfer of the trust fund by Mrs. Dickel to the Detroit Trust Company, then the argument advanced in behalf of plaintiff fails.
>
> "Was the tax involved in this controversy a tax upon that transfer? The answer to this question depends upon the interpretation or construction to be given to the act of Congress under which the tax was levied. The Estate Tax Statute of 1916 is a part of the General Revenue Act of that year, and the sections of the act here important to consider are sections 201, 202, 203 and 209.
>
> "Section 201 provides: 'That a tax equal to the following percentages of the value of the net estate to be determined as provided in section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act'. It is true that the term 'net estate' occurs twice in this section. But it does not necessarily follow that the term is used with the same meaning in both instances. Indeed, the context shows quite clearly that the 'net estate' first mentioned is merely an important and essential element of the measure of the tax, while the other is the actual net estate of the decedent upon the transfer of which the tax, so measured, is to be levied.
>
> "The value of the 'net estate' which constitutes an element of the measure of the tax is to be determined in

the manner provided in the subsequent section of the act. The 'net estate' upon the transfer of which the tax is to be assessed is that part of the decedent's estate which will be distributed to those entitled thereto either under the provisions of his will or in accordance with the laws of distribution and descent.

"The latter part of section 201 and sections 202 and 203 prescribe the method of determining the amount of the tax.

"Section 209 provides the remedy or means for the collection of the tax. Transfers made or trusts created by the decedent during his lifetime, without consideration 'and in contemplation of or intended to take effect in possession or enjoyment at or after his death, are to be considered solely for the purpose of determining the measure or amount of the tax and not for the purpose of determining the property upon the transfer of which the tax is to be laid. So that it seems entirely clear that section 201 imposes the tax upon the transfer of the net estate existing and belonging to the decedent at the time of his death, while sections 202 and 203 provide for the ascertainment of the measure, and thereby the amount, of the tax which shall be imposed upon such net estate regardless of its amount or value.

"This construction of the statute gives to the language thereof its ordinary and natural meaning and removes whatever doubt might otherwise exist as to the validity of the legislation.

"In the present case we are not concerned with the questions of whether a valid tax could have been imposed if the whole of Mrs. Dickel's property had been included in the conveyance to the Detroit Trust Company and she had died possessed of no estate, or whether the tax could have been collected from the trustee if it had not been paid by the executor. Mrs. Dickel left an estate of the value of approximately $800,000 to be distributed in accordance with the provisions of her will.

"The executor has paid the tax, and, in this suit, seeks to recover for the estate which he represents what he has been compelled to pay. Whatever the result of this litigation may be, neither the trustee nor the beneficiaries under the trust will be affected. It will be time enough to determine the rights and liabilities of a trustee or transferee when a case is presented involving that question. If that portion of section 209 which

creates a possible lien upon the property transferred and a contingent liability on the part of the trustee or transferee should be declared unconstitutional, the other provisions of the statute would not be affected.

"It is argued by counsel for the plaintiff that to give the statute the construction here announced might, in some cases, create gross inequality and injustice. In matters of taxation, the Congress is clothed with broad powers and exact equality is a practical impossibility. Courts may not inquire as to the advisability or even the justice of taxes. Courts have no interest in the question of the amount of the tax imposed or the methods provided for its collection, provided that both the tax and the methods are within the constitutional limitations.

"It is said in argument, as an extreme illustration, that, if a decedent prior to his death, has conveyed and transferred all of his property so that nothing remains, there could be no tax because there would be nothing upon which it could be assessed. That may be true. But, even in such case, no unconstitutional inequality would be created. This statute acts alike upon all estates of the same character and in the same situation and that is all that is required. One of the vices of this contention or thought is that it relates alone to the beneficiaries of the decedent's estate and not to the estate itself. At the time of the death of the person, the transfer of whose estate is taxed, the beneficiaries have no vested rights which cannot be interfered with or disturbed."

There is much in this argument with which we do not agree; still it does demonstrate the point which we do make, namely that sections 201 to 208 impose no liability for the tax upon the transferees of property transferred; that for such a tax we must look entirely to section 209, *which, in terms is clearly prospective and not retrospective.* To our argument on that subject we now proceed.

2.

SECTIONS 201-208 IMPOSE AN ESTATE TAX.

The Estate Tax Act was the result of a careful consideration by a Committee of Congress, of the entire subject of Inheritance Taxes, Succession Taxes, Transfer Taxes, Estate Taxes and Probate Duties. The Report of the Committee on Ways and Means to the House of Representatives (H. R. 922, 64th Cong., 1st Sess., at p. 5) shows that the committee recognized the difference between these several forms of taxation. The committee among other things said:

> "Thirty states have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other states have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees."

In adopting this form of taxation it must be assumed that the committee was aware of both its advantages and disadvantages. It must have known that it had been uniformly held that a tax on a past transfer was invalid (*Matter of Pell*, 171 N. Y. 48, and numerous cases following that case).

On the other hand, it must have known that the act of 1864 had been dealt with by this court in *Wright v. Blakeslee*, 101 U. S. 174, and *construed* as laying a tax upon the transformation of "a bare *contingent* remainder" into a *vested* interest, i. e., "an estate in fee in possession absolute" occurring after the passage of the

act although the "bare contingent remainder" had been created many years before the enactment of the act of 1864 (101 U. S. 177).

It must have known the disadvantages to the government of a tax on each separate legacy or distributive share (*Knowlton v. Moore*, 178 U. S. 41; 44 L. Ed. 969).

It is very clear from this that the Committee on Ways and Means of the House of Representatives intentionally adopted this form of taxation, rather than a tax on the particular legacies or upon the "succession" or the coming into possession of the property.

Immediately after the passage of the act, the Internal Revenue Department recognized this fact and ruled that the tax was not an inheritance tax, but an estate tax (see *Regulations of Treasury Department No. 37*, Revised to May, 1917). In those regulations it is said:

> "This is not an inheritance tax, and the interests of separate beneficiaries and the manner of their taking have no bearing upon the question of liability to tax or the amount of tax due. This is a transfer tax in a lump sum, resting upon the decedent's whole net estate computed according to sections 202 and 203 of the act."

This distinction as to the nature of the tax in question has been clearly recognized by the judicial decisions construing the act. Thus, *In re Hamlin*, 226 N. Y. 407; 124 N. E. 4, it is said:

> "That the Congress did intend by the law of 1916 to impose a tax on the net value of the estate of a decedent at a flat rate dependent upon the amount of the same, rather than upon legatees or distributees, is evident by the comparison of the

act of 1916 and the act of 1898. In the latter statute, the provision imposing the tax was embodied under a heading 'Legacies and Distributive Shares of Personal Property'. Under the Act of 1916 the tax is characterized as 'Estate tax'."

In *Corbin v. Townsend,* 92 Conn. 501; 103 Atl. 647, the court said:

"The federal tax under the Revenue Act approved September 8, 1916, and amended March 3, 1917, imposes (section 201) a tax 'upon the transfer of the net estate' of every decedent dying after the passage of the act. It is an estate tax levied on the entire estate, less a named exemption and certain designated deductions without reference to the interest of beneficiaries. By section 208 (U. S. Comp. St. 1916, sec. 6336½) the intent of the act is expressed to be, so far as practicable and unless otherwise directed by the will of the decedent, that 'the tax shall be paid out of the estate before its distribution'.

"The federal act of 1916 imposes a tax payable out of the estate before distribution, thus differing from the federal inheritance tax of 1898, payable by the individual beneficiaries. It is not a tax upon specific legacies, nor upon residuary legatees. It is taken from the net estate 'before the distributive shares are determined rather than off the distributive shares'. Its payment diminishes pro tanto the share of each beneficiary. The executor or administrator must pay the tax out of the estate before the shares of the legatees are ascertained. It is an obligation against the estate and payable like any expense which falls under the head of administration expenses. The tax paid is no part of the estate at the time of distribution; it has passed from the estate, and the share of the beneficiaries is diminished by just so much."

In *Knight's Estate*, 261 Pa. St. 537; 104 Atl. 765, the court said:

> "The act of congress * * * provides that a tax is thereby imposed upon the transfer of the net estate of every decedent dying after the passage of the act, and the following sections provide for a method of valuation of the gross estate and the deductions by which the value of the net estate is determined. This tax is in terms of tax imposed upon the transfer of the net estate of a decedent passing to others under the provisions of his will or intestate laws of the several states. It is denominated an estate tax, not a tax upon the succession or inheritance, and it is charged upon and payable out of the net estate of the decedent. It is imposed without regard to the provisions of the will or the law of the several states. The paramount taxing power of the federal government takes effect at the moment of the owner's death upon his entire estate, subject only to the specific deductions mentioned in section 203 (section 6336½b) and an exemption of $50,000 and it requires payment therefrom of a tax according to a graduated scale regulated by the net amount of the taxable estate."

In *People v. Pasfield*, 284 Ill. 450; 120 N. E. 286, the court used this language:

> "Section 207 of the said act provides that the executor shall pay the tax to the collector or deputy collector. This statute differs somewhat from the federal statute of 1898 (act of June 13, 1898, sec. 448, 30 Stat. 448), as the latter act levied an excise or duty on the distributive share of each legatee or distributee, while the former levies a duty, as above shown, on the entire net estate before any distribution is made to the legatees or distributees. The duty levied by the federal act of September 8, 1916, resembles very closely the old English probate duty established in 1694 and the probate duty of

1862 and 1864, levied by the acts of Congress of the United States. The old probate duty was treated in England as an expense of administration to be deducted out of the residue of the estate. (*Knowlton v. Moore*, 178 U. S. 41; 20 Sup. Ct. 747, 44 L. Ed. 969.) The federal act of September 8, 1916, levies a duty against the value of the entire mass of the decedent's property, real or personal, tangible or intangible, wherever situated, after deducting for funeral expenses, administration expenses, claims against the estate and the other deductions mentioned in said act, and makes the same a lien against the property in whosesoever's hands the same may pass by transfer or otherwise. As the duty is made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute, the duty is an expense or a charge against the estate of the decedent, and not an express charge against the shares of the legatees or distributees of the decedent. The legatees and distributees cannot in any sense be held to have 'received' any part of the duty that is paid to the government by the executor or trustee or administrator as such estate tax and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent, as was given in the federal act of 1898 by the court in *Knowlton v. Moor*, supra."

The same conclusion is reached in

Plunkett v. Old Colony Trust Company, 233 Mass. 471; 124 N. E. 265;

In re Roebling's Estate, 89 N. J. Eq. 163; 104 Atl. 295;

In re Sherman's Estate, 179 App. Div. 497; 166 N. Y. S. 19.

This distinction has also been recognized by this court. Thus, in *Lederer v. Northern Trust Company*, 262 Fed. 52, it was held that the inheritance tax of the State of Pennsylvania was an estate tax as distinguished from a legacy tax and was, therefore, a tax against the entire estate and was deductible in computing the net estate of the decedent for the purpose of fixing the federal estate tax and a writ of certiorari was denied by this court (253 U. S. 487; 64 L. Ed. 1026; 40 Sup. Ct. 483). On the other hand, in *New York Trust Company v. Eisner*, ...U. S. .....; 41 Sup. Ct. 506 (1921), this court held that the inheritance tax of New York was a charge against the heir or legatee and was not a charge against the entire estate and that it was, therefore, not deductible in computing the net estate of the decedent for the purpose of fixing the federal estate tax.

It is perfectly clear from these considerations that congress did not intend to impose any tax in the nature of a succession tax or a tax upon the coming into possession of the property, or a tax upon distributive shares, or a tax upon particular heirs or legatees, and it, therefore, clearly did not intend to re-enact the provision of the act of 1864 which came under review and was construed as we have shown above in *Wright v. Blakeslee*, 101 U. S. 174. The framers of the act of 1916 having thus consciously adopted an estate tax rather than a tax upon the coming into possession of property transferred, or upon the transformation of a *contingent* into a *vested* interest, necessarily limited themselves in the extent to which they could reach transfers made before

the passage of the act. By section 201, the following tax is imposed:

> "That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act."

This provision standing alone would indicate that the tax is on the transfer of the net estate *of the decedent.* There is no suggestion in it that the tax is imposed upon anything but the estate of the decedent, which in common parlance would necessarily mean the property which he owned at the time of his death. But section 202 provides how the net estate is to be "determined" and provides that it shall be determined by including the property left by the decedent, certain property transferred by him and certain property held by him as joint tenant. Section 202 does not in terms impose any separate, new or different tax, but simply provides the method by which the tax already imposed by section 201 is to be "determined" and it provides that it shall be determined by including with the property owned by the decedent, certain property transferred by him and certain property held by him as joint tenant. This provision, it should be noted, does not *in terms* impose a tax upon the creation of a joint tenancy, nor upon the transfers therein mentioned, but the tax is upon the transfer of the net estate of every decedent referred to in section 201, and section 202 in terms only provides the method of determining the net estate. But whether the tax imposed by these sections is upon the transfer

which occurs at death of the decedent, measured in part by the property transferred during his lifetime, or is in part upon the original transfer itself, neither section 201 nor section 202 imposes any liability for the tax upon the transferee of property transferred as provided in subdivision (b) of section 202.

3.

SECTIONS 201-208 IMPOSE NO TAX ON THE TRANSFEREE.

Whether the tax imposed by those sections is as the Government claims a tax on the estate left by the decedent, measured by the property transferred, or is a tax on the transfer itself, these sections impose no liability for the tax upon the transferee of the property. The provisions of section 203, allowing certain deductions, all have to do with deductions incident to the decedent's estate and have nothing to do whatever with the transferee. Section 205 makes it the duty *of the executor* to make return of the tax. Section 207 provides for its payment *by the executor*, and section 208 provides that if it is not paid, a suit shall be brought to subject the "property of the decedent" to the payment of the tax. There is no provision in this section for the subjection of the property transferred to the payment of the tax. Down to this point, we think it quite clear that no liability for the tax is imposed upon the transferees of property transferred by the decedent in his lifetime.

4.

SECTION 209, IMPOSING A TAX ON THE TRANSFEREE AND A LIEN ON PROPERTY TRANSFERRED, IS NOT RETROACTIVE.

This brings us to the second portion of section 209. This portion of the section reads as follows:

> "If the decedent *makes* a transfer of, or *creates* a trust with respect to, any property, in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax."

This is the only place in which a liability for a tax is imposed upon the transferee of property transferred, and we immediately see a marked difference in its language. Subdivision (b) of section 202 refers to property of which the decedent "has at any time made a transfer". The Government contends that this language is retroactive because of the use of the word "has" and also on account of the use of the words "at any time". It is our contention that this language is not retroactive and that the past tense is used with reference to events occurring before the decedent's death, but not before the passage of the act. (See *Curley v. Tait*, 276 Fed. 840, D. Ct. Md. 1921) But when we come to section 209 we find that even the words upon which the Government relies in section 202 are omitted and that the section reads simply, "If the decedent *makes* a transfer of, or *creates* a trust," etc. Here there is

no language of any kind which looks to the past or in any way is even capable of retroactive operation. Much less is there anything in this section that imperatively demands that the section be given a retroactive effect. In sections 201 to 208, Congress was imposing a tax payable from the decedent's estate, payable therefrom before distribution and payable by his executor. It thereby imposed no liability for the tax on the transferee of property transferred in the lifetime of the decedent, and we must look entirely to section 209 for the imposition of any such a tax, but that section cannot be extended beyond its own language. By it Congress intended to impose a liability for the tax on the transferee of the property in certain cases and those cases are "If the decedent *makes* a transfer of, or *creates* a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death". It is only as to such a transfer that the personal liability of the transferee is established. But this provision looks entirely to the future. It does not impose such personal liability where the decedent "has" made such a transfer, nor does it impose such a personal liability where the decedent "has at any time" made such a transfer, but it looks entirely to the future and uses the identical language which has been used in many other acts of the various states imposing transfer taxes and in all of which the acts have been held to apply only to future transfers.

5.

EVEN IF THE ACT CAN BE CONSTRUED AS INTENDED TO ENFORCE A TAX AGAINST THE PROPERTY OF THE DECEDENT WITH RESPECT TO A TRANSFER MADE BEFORE THE PASSAGE OF THE ACT, IT CANNOT BE CONSTRUED AS IMPOSING UPON THE TRANSFEREE OF THE PROPERTY TRANSFERRED OR UPON THE PROPERTY TRANSFERRED SUCH A LIABILITY WITH RESPECT TO A TRANSFER MADE BEFORE THE PASSAGE OF THE ACT.

In the briefs in the other cases which we have referred to in this brief, the authorities have been collected showing that the words "has at any time made a transfer" are subject to the general rule of interpretation that they cannot be retroactively applied unless they are not capable of any other interpretation. It is also there shown that they should be read like other provisions as meaning at any time after the passage of the act. But, however, this may be with respect to the liability there imposed upon the property of the decedent, there is scarcely any room for argument when we come to consider the entire act with respect to the imposition of a liability for the tax upon the transferee. If sections 201 to 208 themselves imposed a tax enforcible against the transferee, there would be no purpose or necessity whatever for the provision of section 209. It is clear that down to section 209 no provision had been made for any liability imposed on the transferee. But even if sections 201 to 208, standing alone, could be construed as imposing any such a liability, the possibility of that is removed by the presence of section 209, which clearly shows that the framers of the act realized that no such liability down to that point had been

imposed. The nature and the amount of the tax had already been fixed, but it was a tax payable from the decedent's estate, payable by his executor and enforcible by suit against "the property of the decedent" and section 209 is the only provision of the act under which any liability is imposed upon the transferee. Even assuming, which we do not, that the provisions of section 209 and the previous sections only create a doubt on the subject, that doubt must be resolved in favor of the prospective operation of the act and against the retroactive effect thereof. If there be any doubt, the act cannot be given a retroactive effect, because an act can only be given a retroactive effect where the language is such as to imperatively require that it be given a retroactive effect. It would only be by construction, and, we think strained construction, that it could be held that sections 201 to 208 imposed any liability for the tax whatever upon the transferee; and such holding would change the language of section 209 from the future tense to the past tense. In other words, its language would be made retroactive when, on its face, it was purely prospective.

6.

THE DECISIONS AS TO LIKE ACTS ALL SHOW THAT THE ACT CANNOT BE CONSTRUED RETROACTIVELY SO FAR AS THE PERSONAL LIABILITY OF THE TRANSFEREE OF THE TRANSFERRED PROPERTY IS CONCERNED.

Estate of Frees, 62 Cal. Dec. 405; 201 Pac. 112, decided September 30, 1921, involved the liability of certain property to an inheritance tax under the law of

the State of California. If the property was community property on a certain date, it was not subject to the tax. If it was separate property of the decedent on that day, it was subject to the tax. As affecting that question, the legislature passed an act changing the definition of community property, which act read as follows:

> "Personal property, wherever situated, *acquired* while domiciled elsewhere, which would not have been the separate property of either if *acquired* while domiciled in this state, is community property."

The court held that this act could have no application whatever to property so acquired prior to the passage of the act and held that the act should be construed as if the word "hereafter" were inserted in the act so that it would read as follows:

> "Personal property wherever situated *hereafter* acquired while domiciled elsewhere, which would not have been separate property of either if acquired while domiciled in this state, is community property."

This is exactly our contention as to the language of the act in question, namely, that it should be construed (if any construction be necessary) to read, "If the decedent hereafter makes a transfer".

In reaching that conclusion the court said:

> "It is also a general rule of statutory construction that statutes should not be construed retrospectively unless it is clear that such was the legislative intention. (Bascomb v. Davis, 56 Cal. 152.) In *Cooley on Constitutional Limitations*, it is said:

> * * * 'It is a sound rule of construction that a statute shall have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.' (7th Edition, page 529.) In *Endlich on the Interpretation of Statutes* (page 362) it is said: * * * 'Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be, that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention'."

In the case of *Succession of Westfeldt,* 122 La. 836; 48 So. 281, certain estates were exempt by the Louisiana Constitution from the succession tax and the description of the estates so exempt was expressed in the following language:

> "shall have borne its just proportion of taxes prior to the date of such donation or inheritance".

It will be seen that the language was language applicable to things occurring in the past, with relation to the death of the decedent. The nature of the subject-matter was such that it necessarily dealt with a past event with relation to that event, and still the language was interpreted to be limited to the period after the passage of the constitutional enactment involved and not to cover a period antedating the enactment.

Another case refusing to give a retroactive operation to an act of this kind is the case of *Matter of Forsyth*, 10 Misc. Rep. 477; 32 N. Y. Sup. 175. The act, in that case, read:

> "Such tax shall also be imposed when any such person or corporation *becomes* beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, *whether made before or after the passage of this act.*"

A transfer was made prior to the passage of the act and created vested future estates which did not come into possession until after the passage of the act, but the court held that the transferee became beneficially entitled to the property at the time of the transfer and that the act should not be construed as covering a case where a party came into possession after the act but became beneficially entitled to the property before the passage of the act. In other words, the court construed the word "becomes" as meaning "hereafter becomes" and as excluding a case where a party had already become entitled in expectancy to that to which he afterwards became entitled in possession.

Another case using language very much like the act under review is *United States v. North German Lloyd Steamship Company*, 185 Fed. 158. In that case, the statute read:

> "Any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution *at any time* within three years after she *shall have entered* the United States shall be deemed to be unlawfully within the United States and shall be deported."

The act then proceeded to provide for her deportation and imposed the expense of the deportation upon the steamship company bringing her into the country. The question arose as to whether the act could be made to apply to a person imported into the United States prior to the passage of the act and engaging in the prohibited occupation within the three years' limitation of the act. The act was held not to be retroactive and not to impose a liability upon the steamship company where the importation took place prior to the passage of the act.

Another case involving a statute using very similar language is the case of *Walton v. Woodward*, 73 Kan. 238; 84 Pac. 1028. In that case, the statute provided:

> "That the judge of the District Court, or judge pro tem, before whom a case *has been or shall* be tried, shall have power to sign and settle * * * if the same *has been* legally served upon the adverse party, notwithstanding that the term of office of any such judge or judge pro tem *may have* expired after the rendition of such judgment or making of such order and before such case-made *may have been* settled, provided such case-made *has been* served within the time previously fixed by such judge or judge pro tem of such court."

Under this provision, the question arose as to whether it authorized the settlement of such case-made where the same was settled prior to the act going into effect. Notwithstanding the fact that the past tense was used all through the act, it was held that this would not give the act any retroactive effect so as to authorize a settlement prior to the passage of the act.

Another case in point is the case of *State of Nevada v. The State Bank and Trust Company,* 43 Nev. 388; 187 Pac. 1002. In that case, a statute was passed affecting the compensation of receivers and providing the compensation of

> "a receiver of a corporation appointed in any proceeding *heretofore* or *hereafter* instituted",

which was to be upon a certain basis. The question arose as to whether the act should apply to a receiver appointed before the passage of the act, and the court held that it should not be given that effect. In other words, that it might apply to a proceeding theretofore instituted, but could not apply to a receiver theretofore appointed. In reaching this conclusion, the court said:

> "It is urged primarily that the statute of 1915 is prospective in its operation and has no retrospective effect. As a general rule, a statute will not be construed to operate upon past transactions, but in future only. It is a maxim, which is said to be as ancient as the law itself, that a law ought to be prospective, not retrospective in its operation. Retrospective legislation is not favored, and except when resorted to in the enactment of curative laws, or such remedial acts as do not create new rights nor take away vested ones, is apt to result in injustice. The reason is well expressed in Jones v. Stockgrowers Nat'l Bank, 17 Colo. App. 79:
>
> > 'Every citizen,' says the court, 'is supposed to know the law, and to govern his conduct both as to business affairs and otherwise, in accordance with its provisions. It would be a manifest injustice if, after rights had become vested according to existing laws, they should be taken away, in whole or in part, by subsequent legislation'.

"From a consideration of the pronounced policy of the law against retrospective legislation, there has been evolved a strict rule of construction in this regard:

> 'There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action only, that construction will be given it.' (citing cases)
>
> 'This rule,' says Patterson, J., in United States v. Heth, supra, 'ought especially to be adhered to, when such a construction (retrospection operation) will alter the pre-existing situation of parties or will affect or interfere with their antecedent rights, *services* and *remuneration;* which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' (The italics are ours.)

"It is apparent that the statute does not deal with anything which is ordinarily the subject-matter of legitimate retrospective legislation, but seeks to establish a different rule of compensation for the services of receivers in a particular class of cases from that which was in force at the time of the enactment. In other words, it seeks to enact a new rule of civil conduct entirely prospective in its nature. So the rule against retrospective construction must be given full effect. The language of the statute, 'A receiver of a corporation appointed in any proceeding heretofore or hereafter instituted,

* * *' could have been transposed by the legislature so that no doubt would be left of the intention to give it retroactive operation. If it read, 'a receiver of a corporation heretofore or hereafter appointed in any proceeding instituted, * * * *' all doubt would have been removed. It would be reasonable to assume that such a simple and natural transposition of a few words of the same language clarifying and rendering unmistakable the intention of the legislature would have been made, if retrospective operation of the statute were meant. The words of the statute, 'A receiver of a corporation appointed,' are clearly of prospective operation, as are the words, 'proceedings hereafter instituted'. The only language in the statute of retrospective operation is the word 'heretofore', but this seems to refer to any proceeding instituted, and not to the appointment of a receiver. It is quite possible that a proceeding for the involuntary liquidation or dissolution of a corporation may have been pending in this state when the statute was enacted and a receiver thereafter appointed, so there is nothing incongruous in the view that the legislature intended to provide for such a case, as well as for future proceedings and appointments."

Another case under a statute employing words much more expressive of a past event than those used in the statute here involved is the case of *Seale v. Balsdon*, ...Cal. App.....; 197 Pac. 971. In that case an amendatory statute regarding assessments in reclamation districts was passed, which read as follows:

> "When any tract of land on which an assessment, or assessments, *shall have been made* shall be subdivided into smaller parcels",

a certain reapportionment of the assessment should be made. At the same time the legislature amended an-

other section of the Reclamation Act as to the duties of trustees of reclamation districts authorizing them

> "to reapportion the assessment, or assessments, upon any tract of land that *has been* subdivided into smaller parcels, in such manner as will charge each of said smaller parcels with a just proportion of assessment, or assessments, *previously made* upon said tracts so subdivided in the manner provided by section 3460 hereof".

The question arose as to whether these enactments applied to an assessment which had been levied prior to their enactment. In holding that the enactments had no retroactive effect and did not apply to an assessment theretofore made, the court said:

> "In Endlich on the Interpretation of Statutes, section 272, 1st edition, it is set forth as a rule of construction that laws will not be given a retrospective effect unless the intention of the legislature that such should be the case is clearly apparent from the context of the act.
>
> "As heretofore stated, the portion of section 3460 of the Political Code here involved, as amended in 1917, three and four years, respectively, after the levying of the assessments, reads as follows: 'When any tract of land upon which an assessment, or assessments, shall have been made shall be subdivided into smaller parcels', etc. The words 'shall have been', grammatically construed, relate to the future perfect tense, something which is to be done and perfected after the date of the enactment of the law in question.
>
> "In *State ex rel. Alden v. City of Newark, etc.*, the words 'shall have been' and 'shall be' were given interpretation, the court using this language:
>
> " 'It is claimed that the words 'shall have been', in the proviso, relate to the past; that their effect is to heal all irregularities in notices named in the

act, which have occurred prior to its passage, and that the statute is intended to be retrospective. It is, however, obvious that all the terms used in this act are prospective, and apply only to the future. This is so, without dispute, in that part of the section which precedes the proviso. In the latter part of the sentence, the only words that are alleged to have a retrospective signification are those already quoted—'shall have been'. These words, and the following words 'shall be', will not, however, relate to acts that were past when the law was enacted. 'Shall have been' is the future perfect tense, which represents an event as completed in future time, and 'shall be' represents what will take place in future time. If the legislature had intended to make the law retroactive, it would have been easy to express it by the use of the words has been or had been, in the present or past perfect tense, or other equivalent words.'

"In Dewart v. Purdy, 29 Pa. 113, the Supreme Court, in dealing with this question, holds as follows:

" 'Nothing short of the most indubitable phraseology is to convince us that the legislature meant their enactment to have any other than a prospective operation; and when they fix a future day for it to take effect, they stamp its prospective character upon its face. Their language in the section before us is, 'that in all cases of partition of real estate in any court wherein a valuation *shall have been made* of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, who shall, at the return of the rule to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned'. * * *

"This phrase, 'shall have been made', is an instance of the future perfect tense. It contemplates a valuation perfected, but perfected in future, and

> the future of this statute was all subsequent to the specified date."

It must be obvious from these considerations that no positive conclusion can be reached by any nice consideration as to the exact shades of meaning properly grammatically applicable to certain words. In other words, under this decision if the language had been:

> "To the extent of any interest therein of which the decedent shall have at any time made a transfer, or with respect to which he shall have created a trust",

this would be held to be grammatically the use of the future perfect tense and not the past tense; or if the language had been

> "to the extent of any interest therein of the decedent, which shall have been at any time transferred",

this would be held to be grammatically the use of the future perfect tense and not the past tense; so if the statute had read:

> "to the extent of any interest therein of the decedent as to which a transfer shall have at any time been made",

this would, likewise, have been an instance of the grammatical use of the future perfect tense and not the past tense. Even if we concede that grammatically the words "has been" or "had been" denote the past tense, we are not particularly advanced in determining the meaning of the statute in this regard, because, of course, the act deals with a past event as relates to the date of the death of the decedent. The decedent could not make a transfer of this kind after his death, nor

could he create a trust by a transfer of that kind after his death and any statute dealing with the situation as to something done by the decedent necessarily would use words either in the past tense or the past perfect tense. In other words, something perfected and not something to be perfected in the future. But full effect can be given to the grammatical effect of these words by having them relate to something done by the decedent prior to his death rather than having them relate to something done prior to the passage of the act. In other words, if the word "has" is to be construed as meaning "has prior to the passage of the act", then the provision would not apply to a transfer made *after* the passage of the act.

7.

DECISIONS LIMITING THE OPERATION OF ACTS SIGNIFICANTLY PERTINENT TO THE PRESENT CASE FORCIBLY EXPRESS THE TENDENCY OF JUDICIAL DECISIONS NOT TO GIVE RETROACTIVE EFFECT TO TAX LEGISLATION.

Two *construction* cases, quite pertinent here, arose in New York in 1894. They are *Tallmadge v. Seaman*, 9 Misc. 303; 30 N. Y. S. 304, and *Matter of Forsyth*, 10 Misc. 477; 32 N. Y. S. 175.

Both cases involved an addition made in 1892 to the New York transfer tax law. The force of the decisions can be best brought out by first quoting the pertinent parts of the New York laws of 1835, 1887, 1891 and 1892. They are as follows:

New York Laws of June 30, 1885, and June 25, 1887:

"Sec. 1. After the passage of this act, all property which shall pass by will or by the intestate laws of this state or [be] * * * transferred by deed [etc.] * * * made or intended to take effect in possession or enjoyment after the death of the grantor * * * or *by reason whereof any person shall become beneficially entitled in possession or expectancy to any property* * * * shall be and is subject to a tax." (Laws of New York, 1885, Chap. 483, p. 820; 1887, Chap. 713, p. 921.)

New York Law of April 20, 1891:

"Sec. 1. After the passage of this act, all property which shall pass by will or by the intestate laws of this state or [be] * * * transferred by deed [etc.] * * * made in contemplation of the death of the grantor * * * or intended to take effect in possession or enjoyment after such death * * * or *by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy to any property* * * * shall be and is subject to a tax." (Laws of New York, 1891, Chap. 215, page 409.)

New York Law of May 1, 1892:

"Sec. 1. A tax shall be and is hereby imposed upon the transfer of any property * * * in trust or otherwise, to persons or corporations * * * in the following cases:

(1) When the transfer is by will or by the intestate laws of this state from * * * a resident of the state;

(2) When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state;

(3) When the transfer is * * * by deed [etc.] * * * made in contemplation of the death of the grantor * * * or intended to take effect in possession or enjoyment at or after such death. *Such*

tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act." (Laws of New York, 1892, vol. 1, page 814, chap. 399.)

Tallmadge v. Seaman, the first of the two cases above mentioned, *construed* the provision of the New York act of 1892 which is italicized above.

The following is taken from the syllabus:

"Testator, who died in 1876, devised his property to trustees, to pay the income thereof to his nephew during life, with remainder to his children. The nephew died in 1893, and *his children were all living at testator's death* [in 1876 and are still living]. Held, that under the transfer tax act (Laws, 1892, c. 399) which imposes the tax on transfers of property by will to collateral heirs, 'where any such person becomes beneficially entitled in possession or expectancy to any property or the income thereof, whether made before or after the passage of this act,' the estate was not liable to taxation, as the latter clause applies only where a transfer was made before the passage of the act, and the beneficial interest thereunder vests afterwards." (30 N. Y. S. 304.)

The court after quoting the provision italicized above, said:

"This latter clause * * * is meant to cover a case where the conveyance may have been made prior to the act, and yet the beneficial interest, whether in possession or expectancy, should attach after the passage of the act of 1892. * * * The plaintiff is entitled to an adjudication that the estate is not liable to taxation." (9 Misc. 306.)

Matter of Forsyth, 10 Misc. 477, 32 N. Y. S. 175, involved the *construction* of the same clause in the act of 1892.

The syllabus reads as follows:

"The Transfer Tax Act of 1892 was not intended to be retroactive, and does not apply to a beneficial interest transferred before its passage, although such interest did not vest in actual possession until after such passage.

"By the will of a testator, who died in 1873, a trust was created for the benefit of his wife, a portion of the principal of which was to be paid on her death to certain persons. The widow died in 1893. Held, that the remaindermen became beneficially entitled to their rights at the time of testator's death, and that they were not taxable under the act of 1892. (10 Misc. 477.)"

In construing the provision the court said:

"Becoming beneficially entitled is quite a different thing from becoming entitled to actual possession. In this case the legatees became beneficially entitled to their rights in the testator's property at his death in the year 1873. At the time of that event the transfer by the will of their beneficial interest occurred, while they only became entitled to the actual possession of the property at the death of the widow.

"The transfer of the beneficial interest having occurred before the passage of this or of the previous acts, it is not subject to the tax, unless the act is intended to be retroactive. To conclude that this clause in the act was intended to be retroactive would be to extend its effect beyond the scope of the remainder and principal part of the act, which is not a necessary construction, and is improbable. It is very much more probable that it was intended simply to have this clause, in harmony with the rest of the act, cover transfers, if any there should

be, whereby, either by will or deed, whether executed before or after the passage of the act, a person or corporation thereafter should become beneficially entitled to any property * * * I therefore conclude that no tax is due." (10 Misc. 480.)

As above stated, the foregoing cases arose in New York in 1894. In the following year, *Tallmadge v. Seaman* was affirmed by the New York Court of Appeals in *Matter of Seaman*, 147 N. Y. 69, 41 N. E. 401 (1895). The Court of Appeals held that the clause respecting past transfers referred only to future occasions where title passed after the enactment of the law of 1892 although the conveyancing had been initiated before that law was passed. In the course of its decision, the court considered the words "becomes beneficially entitled" and showed that a donee "becomes beneficially entitled in possession or expectancy" when there is a transfer of title to him, and that therefore the meaning of the provision was that if a donee became invested with title after the passage of the act, the clause in terms laid the tax notwithstanding the fact that the initial conveyance had occurred before the passage of the act. The court said:

"These four children [the remaindermen] at the death of the testator [in 1876] were 'beneficially entitled' to their remainders in 'expectancy' [since the children were all living in 1876 and their remainders were vested interests under the New York Law]. An estate 'in expectancy' is one where the right to the possession is postponed to a future period, and it is 'beneficial' where the devisee takes solely for his own use or benefit, and not as the mere holder of the title for the use of another. So that the four children, as I have said, were bene-

ficially entitled in expectancy, at the date of testator's death [in 1876] to the estates which later [at the death of the surviving life tenant in 1893] came into their actual possession." (147 N. Y. 69, 77, 41 N. E. 401, 403, column 1, foot.)

The most recent decision construing the New York provision of 1892 (copied into the California law in 1911) is *Estate of Potter,* 63 Cal. Dec. 141, decided by the Supreme Court of California February 2, 1922.

The decedent had made two transfers to her son: (a) a transfer made in 1908, intended to take effect in enjoyment at her death, and taxable under the California act of 1905 in force at the time of the transfer, and (b) a transfer through her will, effective at her death in 1916, taxable under the California laws of 1913-15 in force at that time.

While it was admitted by the taxing authorities that the rates prescribed in the act of 1905 controlled the tax upon the transfer of 1908, nevertheless it was contended that the provision in the California statute copied in 1911 from the New York law of 1892 authorized the addition of transfers made both before and after the acts and the taxation of the transfer under the will as though it were at the top of the combined valuation of both transfers.

This argument made it necessary for the court to consider the meaning of the provision in the act of 1911, and to determine whether it was intended to be retroactive or prospective in operation only.

In order that the decision may be more clearly understood, we here reproduce the California law as it existed

from 1893 to 1911, and also as it has existed from 1911 to the present date. (It will be noted that the California law of 1893 was not copied from the New York law of 1892, but followed the New York laws of 1885, 1887, and 1891. It was not until 1911 that the New York provision of 1892 was introduced in California.)

California law from 1893 to 1911:

"Sec. 1. * * * all property which shall pass, by will or by the intestate laws of this state (or) * * * which shall be transferred by deed (etc.), * * * made in contemplation of the death of the grantor * * * or intended to take effect in possession or enjoyment after such death * * * *by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property* * * * shall be and is subject to a tax."

California law from 1911 to present time:

"Sec. 2. A tax shall be and is hereby imposed upon the transfer of any property, * * * in trust or otherwise, to persons, institutions or corporations * * * in the following cases:

(1) When the transfer is by will or by the intestate * * * laws of this state, from * * * a resident of the state.

(2) When the transfer is by will or intestate laws of property within this state and the decedent was a non-resident of the state * * *.

(3) When the transfer is * * * by deed, (etc.) * * * in contemplation of the death of the grantor * * * or intended to take effect in possession or enjoyment at or after such death. *When such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this act.*"

With these statutes before us, the following extract from the opinion (*Estate of Potter*, 63 Cal. Dec. 141, 146-8) is self-explanatory:

> "The respondent relies on section 2 of the act. The parts of this section material to the case are as follows:
>
> 'A tax shall be and is hereby imposed upon the transfer of any property * * * to persons, institutions or corporations, * * * in the following cases: * * *
>
> 3. When the transfer is of property * * * within this state, by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death. When such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, *whether made before or after the passage of this act.*'
>
> It is claimed that the italicized clause of the last sentence shows the legislative intent to impose a tax on previous transfers, so far as lawfully possible, * * *. It may be remarked that the insertion of a period instead of a comma, preceding the word 'when' and so dividing subdivision 3 into two distinct sentences, as above shown, is obviously a typographical or clerical mistake and that it should be read as if the comma were inserted. This does not change the effect, but it makes the meaning clearer.
>
> We have seen that the legislature had no power to add to or take from the tax upon the gift of 1908 after it was made. If taken literally and apart from its immediate context, the clause above italicized would express the intent to do so, but the result would be that under the rule established by *Hunt v. Wicht* (174 Cal. 205) and the other cases

first above cited the act would be to that extent unconstitutional and void. Such a result, as we have seen, is to be avoided, when it can be fairly done. We must, therefore, look to the context to ascertain if a meaning is apparent that would produce a result that does not make the subdivision retroactive in effect and brings it within the scope of the legislative power. The first part of this final sentence or clause, in connection with the opening part of the subdivision, states that such transfer tax is to be imposed 'when such person, institution or corporation *becomes* beneficially entitled in possession or expectancy to any property'. In a very common acceptation of its meaning the word 'becomes' betokens futurity; something that is yet to happen. The right of the state to the tax is not to vest until the person to be charged therewith 'becomes beneficially *entitled*' to the property. This evidently refers to some time after the passage of the act, and in view of the fact that it would be void if it referred to a past vesting of title, it must be presumed that it was intended to refer to a future vesting of title in possession or expectancy. This would make it inconsistent with the literal meaning of the last clause unless we find that there may be a vesting of title, a becoming *entitled,* after the passage of the act, which vesting arises from a 'deed, grant, bargain, sale, assignment or gift' executed before the passage of the act whereby the words may have literal effect upon transfers vesting in future. It is obvious that the phrase 'such transfer' in the last clause refers back to these methods of transfer, and that the clause is to be understood as if it read: 'by any such deed, grant, bargain, sale, assignment or gift, whether made before or after the passage of this act.'

A future interest is either: 1. Vested; or, 2. Contingent. (Civ. Code, sec. 693.) 'A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible,

to the immediate possession of the property upon the ceasing of the intermediate or precedent interest.' (Civ. Code, sec. 694.) 'A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.' (Civ. Code, sec. 695.) It is competent for the legislature to impose a tax upon any transfer of this character, where the property passing by transfer does not become vested under it until after the act imposing the tax is enacted. Transfers are often made under these sections by some instrument in writing, whereby contingent interests are created to pass in the future and which do not become vested until years after the execution of the instrument. Transfers of this character were considered in *Estate of Rogers*, 94 Cal. 530; *Estate of Winter*, 114 Cal. 186; *Estate of Blake*, 157 Cal. 460; *Estate of Carothers*, 161 Cal. 588; *Taylor v. Cowen*, 154 Cal. 804; *Hall v. Wright*, 17 Cal. App. 504, and *Estate of Washburn*, 11 Cal. App. 740. Bearing in mind the aforesaid constitutional limitations upon legislative power, we may easily see that the phrase 'becomes beneficially entitled in possession or expectancy' was intended to include, among others, estates or interests of this character where the instrument creating them was made before the passage of the act and the contingent title thereby provided for should not become vested until after its passage. With this possibility in mind, we see at once the occasion and purpose of the insertion of the clause 'whether made before or after the passage of this act'. It was intended to make it clearly include instruments of transfer of this character. Thus all the words of the section may have a clear, practical effect in full harmony with the constitution. This we think must be held to be its true meaning. The result is that it is not retroactive in effect, that it was not so intended, and that this section does not, by implication or otherwise, refer to or affect the

gift which vested in 1908, or authorize the value thereof to be added to the value of the legacy of 1916 for the purpose of boosting the latter into a higher tax rating value."

8.

THERE CAN BE NO QUESTION AS TO SECTION 209, WHICH USES THE WORDS "MAKES" AND "CREATES", WHICH ARE ONLY APPLICABLE TO PRESENT OR FUTURE TRANSACTIONS.

Applying the well recognized rules of construction to section 209, we confidently assert that that section not only does not imperatively require it to be given a retroactive operation, but, on the contrary, there is nothing in the section that even suggests a retroactive operation and, in fact, to give it a retroactive operation would do violence to the language used. The word "makes" is a word naturally used to indicate either a present or a future transaction and is a word that would never be naturally used to indicate a past transaction. It might as well be contended that the word "fails" in section 210 was intended to have a retroactive operation and to apply to a failure occurring before the passage of the act. The words necessarily look to the future and have to do with something done or omitted in the future, and neither of them in any way indicate an intention to make them apply to some transaction taking place in the past and prior to the passage of the act.

9.

THE QUESTION NOW UNDER DISCUSSION IN THE CASE AT BAR IS NOT WHETHER THE ACT IMPOSES A TAX ON PAST TRANSFERS, BUT WHETHER IT IMPOSES A PERSONAL LIABILITY ON THE TRANSFEREE UNDER A PAST TRANSFER, OR A TAX LIEN ON THE PROPERTY TRANSFERRED BY A PAST TRANSFER.

The imposition of a *property* tax is generally made a lien on the property taxed and a personal liability of the owner thereof. But an *indirect* tax may or may not be made a lien on property and the legislature may choose the party on whom it will impose the burden of the tax. It may impose it on the grantor or grantee, buyer or seller, wholesaler or retailer, producer or consumer, importer or exporter, manufacturer or seller, principal or agent, bailor or bailee, promissor or promissee. In the case at bar, the tax was demanded of the transferees. It was sought to seize the transferred property to satisfy the tax. It was paid by the transferees to avoid such seizure. The question is, were they liable for it and was their property liable for it? Even assuming that if the decedent had left estate, it would be liable for a tax, with respect to such transfer, does not fix the liability of the transferees or of the property transferred. A personal liability for a tax cannot be enforced without legislation imposing it. A lien for a tax cannot be held to exist unless imposed by law. The act under review imposes no personal liability on the transferees or upon the transferred property except when the decedent "makes" a transfer or "creates" a trust. None is imposed with relation to a past transfer.

10.

OBVIOUS DIFFERENCES EXIST WHICH MIGHT CAUSE THE CONGRESS TO IMPOSE A LIABILITY ON THE DECEDENT'S ESTATE AND NOT ON THE TRANSFEREES OR THE TRANSFERRED PROPERTY.

Transferees taking this property fourteen years before the imposition of the tax, could not be expected to foresee that any such tax would be imposed upon it. They had a right to sell it, to encumber it, to adjust their affairs to it. Vested rights existed in it. Property interests depended upon it. They personally cared for and protected it during those years. On the other hand, heirs and devisees have no vested interest in the property of their testate or intestate until his death. The law may permit them to take or not as the legislature sees fit. They are mere volunteers. Many conditions may be imposed on their taking on account of the nature of the so-called "right" to take at all. Their interest until death cannot be sold or taken on execution, or encumbered. They have no care of the property and are subject to no expense with relation to it.

11.

SO A VAST DIFFERENCE EXISTS BETWEEN IMPOSING A PERSONAL LIABILITY ON THE TRANSFEREES AND A LIEN ON THE PROPERTY TRANSFERRED UNDER A PAST AND A FUTURE TRANSFER.

In the one case the interest vested without knowledge of the imposition. The property may have been sold, encumbered or taken under execution, without knowl-

edge of the tax. In the other, anything that was done was with full knowledge of the law imposing the burden. Many other reasons could be recited why the situation between transferees and heirs and between past and future transferees is entirely different. So there is nothing extraordinary in the fact that the Congress made one rule regarding property passing to heirs and devisees and another rule as to property passing by transfer, or one rule as to property transferred in the future and another rule as to property transferred in the past. There are more reasons why such a difference should exist than why it should not exist.

12.

THESE DIFFERENCES ARE ACCENTUATED IF IT IS HELD THAT THE TAX IS TO BE BASED UPON THE VALUE OF THE PROPERTY AT THE TIME OF THE DEATH OF THE GRANTOR.

Section 202 of the act provides that the gross estate of the decedent shall be determined by including the value *at the time of his death* of all property etc., including property owned by him and property transferred by him. The complaint in this action alleges that at the time of the transfer the property was of the value of $10.00 per share and at the time of the death of the decedent was of the value of $20.00 per share. The tax was, in fact, assessed on the value at the time of the death of the decedent.

We hereafter in this brief argue that this was an erroneous construction of the act and that the assess-

ment should have been at all events on the basis of the value of the property at the time of the transfer. Assuming, however, that the government is correct in its contention that it should be based on the value of the property at the time of the death of the decedent, it results that if the tax is imposed retroactively on the transferee, he might be taxed with respect to a value that he never owned, realized or enjoyed. In other words, he might dispose of the property shortly after the transfer and it might greatly increase in value thereafter; in fact, to such an extent that a tax based on such increase in value would deprive him of all that he really received from the property. Such a result would be unreasonable if applied to a person receiving the property before such a tax was imposed and when he could not possibly anticipate the imposition thereof. It is obvious that the Congress must have seen the impropriety of any such imposition and, therefore, in section 209, only made the transferee liable where a transfer was made after the passage of the act.

13.

THERE IS ANY CONFLICT BETWEEN SECTIONS 201 AND 202 AND SECTION 209, THE LATTER MUST CONTROL.

If it should be held that we are wrong in our contention that section 209 alone must be looked to for the purpose of determining the liability of transferees, the result would not be different. If both sections 201-202 and section 209 are broad enough to include the liability

of transferees, still any conflict between them must be resolved in favor of the taxpayer:

1st. Because if they together raise any doubt as to the retroactive effect of the act as to transferees, that doubt must be resolved in favor of the prospective operation of the act;

2nd. Because an act imposing a tax must be strictly construed against the government and in favor of the taxpayer;

3rd. Because section 209 being subsequent in location in the act will prevail over a prior provision in case of any conflict.

14.

THAT THERE WAS AT LEAST A DOUBT AS TO THE EFFECT OF SECTION 202 IS CLEAR FROM THE AMENDMENT TO THAT SECTION IN 1919.

By the act of 1919 section 202 was amended by inserting the words:

"(whether such transfer or trust be made or created before or after the passage of this act.)"

If the act already clearly and unmistakenly expressed an intention that it should be retroactive in operation, what necessity for this amendment? If the act already imperatively required a retroactive construction, why the amendment?

An amendment is presumed to make some change in the law.

36 Cyc. 1145,
In re Moore's Estate, 146 N. W. 31;
Reed v. Goldneck, 86 S. W. 1104.

At all events the amendment is at least evidence that there was a doubt as to the operation of the law.

U. S. v. Field (decided Feb. 28, 1921), 255 U. S. 257; 41 Sup. Ct. 256, 65 L. ed.;

Smietanka v. First Trust and Savings Bank, 42 Sup. Ct....., decided Feb. 27, 1922;

Curley v. Tait, 276 Fed. 840 (1921, D. Ct. Md., Rose, D. J.).

15.

THE AMENDMENT OF 1919 DOES NOT EVEN CONSTRUE THE ORIGINAL ACT AS BEING RETROACTIVE.

It will be noted that the act of 1919 is entitled

"An act to provide revenue, and for other purposes."

The parenthetical clause above quoted only extends the act to transfers

"(whether such transfer or trust be made or created before or after *the passage of this act*)."

It did not purport to make the *original* act retroactive, nor did it deal with transfers made before the passage of the *original* act, but simply referred to transfers made before or after "this act", i. e., the *amendatory* act. Nor did it purport to impose a tax retroactively on the "estate" of a decedent dying before the passage of the *amendatory* act. It could have no effect on the case at bar, because the act as amended only became the law applicable to persons dying after *its* passage. As to them and a transfer or trust made by them it imposed

a tax with relation to such transfer or trust "(whether such transfer or trust be made or created before or after the passage of this act)." As to persons dying *before* the passage of the amendatory act, the amendatory act had no effect. An amendatory act only establishes the law from the date of its passage.

While we feel confident that the act of 1916 should not be construed to apply to any transfer made before its passage, at all events it should not be construed to impose any liability upon transferees under such transfers. We also think it clear that the act of 1919 should not be held to apply retroactively to a transfer made by a person dying before the passage of the amendatory act.

16.

THE TAX LEVIED ON THE BASIS OF THE VALUE OF THE PROPERTY AT THE DATE OF THE DEATH OF THE GRANTOR WAS AT ALL EVENTS ERRONEOUS AS THAT WAS DOUBLE THE VALUE OF THE PROPERTY AT THE TIME OF THE TRANSFER.

It is alleged in the complaint that at the time of the transfer in 1902, the property was of the value of approximately $10.00 per share and that at the time of the death of the grantor in 1916 it was worth approximately $20.00 per share and was taxed on that basis. At all events, we contend that this was erroneous.

Section 202 of the act only attempts to levy a tax with respect to property transferred during the lifetime of the decedent

> "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

It seems to us reasonably clear that any such a tax must necessarily be based upon the value of the property at the time of the transfer. This is so, first, because the tax is not placed upon the property transferred nor upon the value of the property transferred, but only to the extent of any interest in the property, of which the decedent has at any time made a transfer.

The interest which he transferred was the interest which he owned at the time of the transfer and any increment in value accruing to the property after the transfer was an interest which he never owned and which he never transferred. Second, this is true because the taxability is dependent upon whether or not the transfer was for a fair consideration in money or money's worth. This must necessarily have to do with the worth of the property at the time of the transfer and if it was then transferred in consideration of an amount which fairly represented its then money's worth it should not be held to be taxable because of some increase in value after the transfer. Third, this must be held to be so on account of the practical difficulties which would result from a contrary construction. Even if the tax is on the transferee, he might sell the property shortly after the acquisition of the property and it certainly would be unjust that some fourteen years

later, he should be met with a tax based on a value of the property which he had never realized and a value which the property did not have at the time he disposed of it. On the other hand, if the tax is on the decedent or the grantor, he likewise lost all control of the property at the date of the transfer and cases could well be imagined where the increase in the property might be so great that a tax thereon, based on its value some fourteen years later, would wipe out his entire estate. This is particularly true of mining property and city real estate and is also frequently true of stock in corporations. Their value frequently depends upon conditions that cannot be foreseen and it would be entirely unjust to compel a person who has disposed of property to pay a tax with relation to such disposition based upon a value which he could not anticipate, never possessed and never enjoyed.

It is true that section 202 says that the value of the gross estate of the decedent shall be determined by including the value *at the time of his death* of all property specified in that section. At the same time, we contend that with respect to the interests which he had transferred in his life time, this is necessarily limited by the other provisions of subdivision (b) of that section, which we have already quoted.

This matter was very fully considered in the case of *Chambers v. Lamb,* 61 Cal. Dec. 817; 199 Pac. 33; under the Inheritance Tax Law of the State of California. The structure of that statute is somewhat different in form from the federal estate tax act, but in substance

it taxed both the passing of the property owned by the decedent at the time of his death and also the transfer of any property transferred in his lifetime in the manner specified in the act. The act left it doubtful as to whether the tax on such a transfer was to be based upon the value of the property at the time of the transfer or upon the value of the property at the date of the death of the grantor, and after thoroughly considering the entire matter the court held that a proper construction of the act was to hold that it should be based upon the value of the property at the time of the transfer and the reasoning of the court is in many ways applicable to the present case.

17.

CONCLUSION.

We respectfully submit that the judgment should be reversed.

Dated, San Francisco,
March 11, 1922.

EDWARD F. TREADWELL,
Attorney for Plaintiffs in Error.

(APPENDIX FOLLOWS.)

Index to Appendix

Appendix

PROVISIONS OF THE ESTATE TAX ACTS OF 1916, 1917 and 1919

Estate Tax Law of 1916 (Revenue Act of 1916, Title II).

(39 Stats. L. 777.)

SEC. 200. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

Seven per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

Ten per centum of the amount by which such net estate exceeds $5,000,000.

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United

States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

SEC. 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum, calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax cannot be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's death until the cause of such delay is removed, and there-

after at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

SEC. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estates subject to the tax or where the gross estate at the death of the decedent exceeds $60,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

SEC. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall assess the tax thereon.

SEC. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax cannot be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall

be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

SEC. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise

directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

SEC 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

SEC 210. That whoever knowingly makes any false statement in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

SEC. 211. That all administrative, special and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

SEC. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

Amendment to Estate Tax Law of 1916 by Act of March 3, 1917 (39 Stats. L. 1002).

SEC. 300. That section two hundred and one, Title II, of the act entitled "An act to increase the revenue, and for other purposes", approved September eighth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:

"SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States.

[Here follow rates of taxation.]

SEC. 301. That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this act shall be computed at the rates originally prescribed in the act approved September eighth, nineteen hundred and sixteen.

Amendment to Estate Tax Law of 1916 by Act of October 3, 1917 (40 Stats. L. 324).

SEC. 900. That in addition to the tax imposed by section two hundred and one of the act entitled "An act to increase the revenue, and for other purposes", approved September eighth, nineteen hundred and sixteen, as amended—

(a) A tax equal to the following percentages of its value is hereby imposed upon the transfer of each net estate of every decedent dying after the passage of this act, the transfer of

which is taxable under such section (the value of such net estate to be determined as provided in Title II of such act of September eighth, nineteen hundred and sixteen):

[Here follow rates of taxation.]

SEC. 901. That the tax imposed by this title shall not apply to the transfer of the net estate of any decedent dying while serving in the military or naval forces of the United States, during the continuance of the war in which the United States is now engaged, or if death results from injuries received or disease contracted in such service, within one year after the termination of such war. For the purposes of this section the termination of the war shall be evidenced by the proclamation of the President.

Amendment to Estate Tax Law of 1916 in 1919

(40 Stats. L. 1097).

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this act*), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title * * * (italicized portion indicates the amendment).

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

HARRIET L. LEVY, PAULINE Jacobs, and Adeline Salinger, plaintiffs in error,

v.

JUSTUS S. WARDELL, UNITED States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California.

No. 303. In error to the District Court of the United States for the Northern District of California.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This case was determined on demurrer in the court below in favor of defendants (R. 10).

The material facts alleged in the amended complaint are: That Henriette Levy was the owner of 22,014 shares which was all of the captial stock of the Levy Estate Company, a corporation; that on December 19, 1902, she assigned 5,000 of said shares to Harriet Levy and Pauline Jacobs each;

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that on January 14, 1903, she assigned 2,660 shares to said Harriet Levy and Pauline Jacobs each, and 2,000 shares to Adeline Salinger; that on January 17, 1907, an agreement was entered into between all of the interested parties wherein it was agreed that because of errors made in the issuance of the stock, all of the certificates should be canceled and certificates be issued to Harriet L. Levy, Pauline Jacobs, and Adeline Salinger for 7,328 shares each, a certificate issued to Henriette Levy for 10 shares, and one to Ruth Salinger for 1 share; and on the same day this agreement was carried out by the board of directors of the corporation; and at the same time Henriette Levy transferred her 10 shares to one of the plaintiffs (R. 3, 4); that the said transfers of said stock by plaintiffs were complete, and "there were no stipulations or conditions mentioned or agreed to by or between the said Henriette Levy, and any of the said transferees, under or by which the said Henriette Levy would ever be entitled to a return of said stock, or any portion thereof," but that plaintiffs "promised and agreed with the said Henriette Levy that they, the said plaintiffs, would pay to said Henriette Levy the dividends on said stock accruing during the lifetime of the said Henriette Levy"; that "the sole and exclusive object and purpose of said Henriette Levy in making said trans fers was to avoid the burden of business care and worry and the management and control of her properties, and to vest in plaintiffs herein definite and

irrevocable present rights of ownership in her stock" (R. 4, 5); that Henriette Levy died December 15, 1916, leaving no property, assets, or estate, and the value of the said shares of stock was at that time $447,625; and that on demand of the collector of internal revenue plaintiffs paid, under protest, in $12,460.84, and their claim for a refund having been disallowed, this action was brought to recover said amount (R. 5, 7).

ARGUMENT.

Clearly, under the allegations of the complaint, the transfers of the stock in question were made to take effect in enjoyment upon the death of Henriette Levy. In fact, its possession was held in trust for Henriette Levy during her life, and the transferees therefore did not come into its possession *for themselves* until her death.

The constitutionality of the Act of September 8, 1916 (39 Stat. 777), and whether or not sections 201 and 202 apply to transfers made or trusts created in contemplation of death or to take effect in possession or enjoyment at or after the death of the transferrer, are discussed in the Government's brief filed in the case of *Shwab* v. *Doyle*, No. 200; and the argument upon those questions will not be here repeated; and the court's attention is directed solely to the questions peculiar to this case.

Relationship of the Several Sections of the Act.

The tax is created by section 201 and is laid "upon the transfer of the net estate of every decedent dying after the passage of this act."

Section 202 specifies what property shall be included in estimating the gross estate, among which is:

> To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth.

Section 203 specifies what deduction shall be made in estimating the net estate.

Section 204 provides that the tax shall be due "one year after the decedent's death." The remainder of section 204 and sections 205, 206, 207, and 208 relate to the process of determining the amount of the tax payable and its payment; and it is provided in section 207 "that the *executor* shall pay the tax to the collector or deputy collector." And in section 208 it is provided:

> If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still

> undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

These provisions make the estate of which the decedent died seized and possessed primarily liable for the tax.

The controversy peculiar to this case arises under the provisions of the last paragraph of section 209. That entire section reads as follows:

> That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.
>
> If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth), and if the tax in respect thereto is not

> paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

There certainly is no peculiar hardship or injustice done by this provision. Those who receive the property have no just ground to complain of being requested to pay the tax in respect to such property, or of a lien being declared thereon to secure the payment of the tax.

The declaration of a lien to secure the payment of the tax does not convert the tax into a direct tax. The act of June 30, 1864 (13 Stat. 287), which laid an excise tax upon successions created a like lien; and in *Scholey* v. *Rew* (23 Wall. 331, 347) this court said:

> Nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction.

In fact plaintiffs do not insist otherwise.

The liability created by section 209 applies to every transaction upon which a tax was imposed by sections 201–203.

Plaintiffs insist that section 209 applies only to transfers made and trusts created after the passage of the act; and that in determining this question this section should be read separate and apart from sections 201 and 202.

It must be admitted that the expressions "makes a transfer" and "creates a trust," when standing alone, do not necessarily include past transactions. But to determine their meaning here they must be read in connection with the other provisions of the statute. They can not control the meaning of the other sections because section 209 is subordinate to those sections, its sole purpose being to provide a method of collecting the tax created by them. To justify the exclusion from the provisions of the last paragraph of section 209 of any class of transfers made and trusts created in contemplation of death, or to take effect in possession or enjoyment at or after the death of the transferrer, there would have to be a clear and positive, and not an implied, expression of such a purpose.

The tense of the verbs is the present, and technically they apply no more to the future than they do to past transactions. The tax does not arise until the death of the transferrer, and the transfer has always been made prior to that time. Therefore,

the verbs "makes" and "creates" *must be given, in any case, the meaning of "has made" or "has created."*

In fact, the present tense is used throughout the provisions relating to the report and payment of the tax, as in section 206:

> if no administration *is* granted upon the estate of a decedent,

or

> if a return *is* filed,

or

> If a return *contains* a false statement, etc.;

And in section 208, first sentence,

> if the tax herein imposed *is* not paid within sixty days,

and in the third sentence,

> if the tax or any part thereof *is* paid by, etc.,

and likewise in the first paragraph of section 209,

> unless the tax *is* sooner paid in full,

and

> except that such part of the gross estate as *is* used.

That the second paragraph of section 209 was intended to apply to transfers made before as well as after the passage of the act is, we submit, conclusively shown by the fact that the same language is retained in section 409 of the act of February 24, 1919 (40 Stat. 1057, 1096). The act of 1916 creating the transfer tax had been in existence for more than two years prior to the passage of that act; and Con-

gress there declared in express language that the tax was laid upon past transfers; and it can not be believed that it was not then intended that the beneficiaries of every transfer made or trust created prior to the passage of the act of 1919 should be liable for its payment.

The judgment of the District Court should therefore be affirmed.

JAMES M. BECK,
Solicitor General.

J. A. FOWLER,
Of Counsel.

APRIL, 1922.